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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1895.

No. 293 41.

BENTON TURNER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED MAY 11, 1895.

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(15,900.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 273.

BENTON TURNER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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1 UNITED STATES OF AMERICA, } ss :
State of New York,

I, Gorham Parks, clerk of the court of appeals of the State of New York, by virtue of and in obedience to the annexed writ of error, do hereby certify that annexed hereto is a true and complete transcript of the record and proceedings had in said court in the cause of The People of the State of New York, respondents, against Benton Turner, appellant, as the same remains of record and on file in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Albany, New York, this 9th day of May, 1895.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

2 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiff, and Benton Turner, defendant, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of said Benton Turner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

The foregoing writ is hereby allowed.

H. B. BROWN,
Associate Justice.

4 [Endorsed:] U. S. Supreme Court. Benton Turner, pl'ff
in error, against The People of the State of New York, def't
in error. Writ of error. Frank E. Smith, attorney for plaintiff in
error; office address, Coal and Iron exchange, 21 Courtlandt street,
New York.

5 UNITED STATES OF AMERICA, } ss :
State of New York,

To Honorable Henry B. Brown, justice of the Supreme Court of the
United States:

The petition of Benton Turner respectfully shows:

I. That on June 6th, 1891, the supreme court of the State of New
York rendered a final judgment against him in a certain cause,
wherein The People of the State of New York were plaintiffs and
your petitioner was defendant, for the sum of two thousand one
hundred ninety-eight dollars and sixty cents (\$2,198.60), as by
reference to the record and proceedings in said cause will more fully
appear.

II. That your petitioner duly appealed from the said judgment
to the court of appeals of the State of New York, and such proceed-
ings were had upon said appeal that on the 9th day of April, 1895,
judgment was rendered against your petitioner and in favor of the
said The People of the State of New York, affirming in all respects
and with costs the said judgment of the supreme court of the State
of New York.

III. That said judgment of the court of appeals is final, and said
court is the highest court in the State of New York in which
6 a decision in said suit could or can be had.

IV. That, as your petitioner is informed and believes, the
record in the said cause is now in the said court of appeals.

V. That your petitioner claims the right to remove said judg-
ment to the Supreme Court of the United States by writ of error
under section 709 of the Revised Statutes of the United States, be-
cause upon the trial of said suit the validity of a statute of the State
of New York, to wit, chapter 448 of the Laws of 1885, was drawn in
question, upon the ground that it was repugnant to the first section
of the fourteenth article of the amendments to the Constitution of
the United States, and the decision of the courts of the State of New
York thereon were and are in favor of the validity of said statute
and against the right claimed by your petitioner under the Consti-
tution of the United States; all of which will more fully appear
from the record of the proceedings in said cause, a copy of which
is herewith submitted.

Wherefore your petitioner prays for allowance of a writ of error
returnable into the Supreme Court of the United States, and for a
citation and supersedeas; and your petitioner will ever pray, &c.

BENTON TURNER.

7 STATE OF NEW YORK, }
County of Clinton, } 88 :

Benton Turner, being duly sworn, says: I am the petitioner above named. I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

BENTON TURNER.

Sworn to before me this 17th day of April, 1895.

A. GUIBAUL,
Notary Public.

8 [Endorsed:] United States Supreme Court. Benton Turner, plaintiff in error, against The People of the State of New York, defendant in error. Petition for writ of error. Frank E. Smith, attorney for plaintiff in error; office address, Coal and Iron exchange, 21 Courtlandt street, New York.

9 New York Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
against
BENTON TURNER, Appellant. }

Assignment of Errors.

The defendant, Benton Turner, hereby alleges error in the record and proceedings in the above-entitled cause as follows:

First. That the court erred in finding that the sale of the land in question made to the People of the State of New York October 12th, 1877, and all proceedings prior thereto from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and were regularly given, published, and served according to the provisions of chapter 427 of the Laws of 1855 and all laws directing or requiring the same or in any manner relating thereto by virtue of the rule of evidence and limitation prescribed by chapter 448 of the Laws of 1885.

10 Second. That the court erred in refusing to receive in evidence the assessment-rolls of the town of Harriettstown for the years 1867, 1868, 1869, and 1870 upon the ground that the same were immaterial and irrelevant by force of chapter 448 of the Laws of the State of New York for 1885 and in overruling the claim made by the defendant that the said statute was repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Third. That the court erred in refusing to allow defendants to show that the warrants attached to Exhibits C and F, being the copy assessment-rolls of the town of Harriettstown for the years 1867 and 1870, were the original warrants and bear the genuine

signatures of the supervisors of the county of Franklin for those years respectively, upon the ground that such facts were immaterial, irrelevant, and incompetent under chapter 448 of the Laws of 1885 and in overruling the claim made by defendant that said chapter 448 was repugnant to the Constitution of the United States.

Fourth. That the court erred in refusing to make the twenty-third, twenty-fourth, and twenty-fifth findings of fact separately, requested by defendant, upon the ground that the deed to the plaintiff upon the tax sale was conclusive evidence, to the contrary of the fact stated in each of said requests respectively.

11 Fifth. That the court erred in refusing to hold that chapter 448 of the Laws of the State of New York for the Year 1885, so far as it attempts or undertakes or purports to render valid and effectual any past sale of land for unpaid taxes, which sale at the time it was made was for any reason illegal and void, is repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Sixth. That the court erred in refusing to hold that chapter 448 of the Laws of New York for the Year 1885, considered as a statute of limitation and with reference to sales of land for unpaid taxes made prior to its passage to the People of the State of New York, which sales were for any reason illegal and void when they were made, is repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Seventh. That the court erred in rendering judgment for the plaintiff.

Wherefore the said Benton Turner prays that the judgment rendered in the above-entitled action against him by the supreme court of the State of New York and affirmed by the court of appeals of the State of New York may be reversed.

12 FRANK E. SMITH,
Attorney for Defendant and Appellant.

13 [Endorsed:] N. Y. court of appeals. The People of the State of New York, respondent, against Benton Turner, appellant. Assignment of errors. Frank E. Smith, attorney for —. Office address, Coal and Iron exchange, 21 Courtlandt street, New York.

14 Know all men by these presents that we, Chauncey Turner and Herbert C. Turner, both of Plattsburgh, New York, are held and firmly bound unto The People of the State of New York in the just and full sum of five thousand dollars, to be paid to the said The People of the State of New York; for the which payment, well and truly to be made, we bind ourselves and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Scaled with our seals and dated this 17th day of April, 1895.

Whereas The People of the State of New York recovered a judgment against Benton Turner in the supreme court of said State for

the sum of two thousand one hundred and ninety-eight dollars and sixty cents (\$2,198.60), which judgment was entered in the office of the clerk of Franklin county, New York, on June 6th, 1891; and

Whereas an appeal from said judgment was taken by said Benton Turner to the court of appeals of the State of New York, which court on April 9th, 1895, rendered final judgment in said cause, affirming with costs the said judgment of the supreme court in favor of The People of the State of New York; and

Whereas the said Benton Turner has prosecuted or is about to prosecute a writ of error to the Supreme Court of the United States to reverse the said judgment of the court of appeals of the State of New York:

Now, therefore, the condition of the obligation is such that if the above-named Benton Turner shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise to remain in full force and effect.

CHAUNCEY TURNER. [L. S.]
HERBERT C. TURNER. [L. S.]

UNITED STATES OF AMERICA, } ss:
State of New York, County of Clinton, }

On this 17th day of April, 1895, before me personally came Chauncey Turner & Herbert C. Turner, both to me personally known and known to me to be the persons described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

WALLACE TURNER,
Notary Public.

UNITED STATES OF AMERICA, } ss:
State of New York, Clinton County, }

Chauncey Turner and Herbert C. Turner, being severally duly sworn, each for himself deposes and says that he resides at Schuyler Falls, Clinton county, New York, and is a freeholder within said State; that he is worth the sum of five thousand dollars over and above all debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

CHAUNCEY TURNER.
HERBERT C. TURNER.

Sworn before me this 17 day of April, 1895.

WALLACE TURNER,
Notary Public.

The foregoing bond approved this 19th day of April, 1895, to operate as a supersedeas.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

A copy.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS, Clerk

17 [Endorsed:] Benton Turner, plaintiff in error, against The People of the State of New York, defendant in error. Superseas bond. Filed April 20th, 1895.

18 UNITED STATES OF AMERICA, ss :

To the People of the State of New York, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Benton Turner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed)

HENRY B. BROWN,

Associate Justice of the Supreme Court of the United States.

19 [Endorsed:] To the People of the State of New York, defendant in error. Rec'd Ap'l 23d, 1895. Due and personal service admitted. Albert Hessberg, att'y for the pl'ff, def't in error.

20 N. Y. Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
against
 BENTON TURNER, Appellant. }

Case on appeal to court of appeals.

Albert Hessberg, attorney for respondent, Albany, New York.
 Frank E. Smith, attorney for appellant, Plattsburgh, New York.

21 Supreme Court.

Trial desired in Franklin county.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, }
vs.
 BENTON TURNER, Defendant. } Summons.

To the above-named defendant :

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear or answer,

judgment will be taken against you by default, for the relief demanded in the complaint.

Dated March 28, 1887.

D. O'BRIEN,

Attorney General,

By P. S. PALMER,

Attorney for the Forest Commission, Plaintiff's Attorney.

Office address, Plattsburgh, New York; post-office address, Plattsburgh, New York.

22 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, }
vs. } Complaint.
BENTON TURNER, Defendant.

The plaintiff complains of the defendant in this action and alleges—

That this action is brought in behalf of the plaintiff by the forest commission of the State of New York.

That the plaintiff is now and at the times hereinafter mentioned was the owner and in possession of the following-described premises, to wit: The southeast quarter of township No. twenty-four (24) in great tract No. one (1) of McComb's purchase in the county of Franklin, New York, and also of lot No. twelve (12) in township twelve (12) in the old military tract in the county of Essex, New York.

That said lands are and were at the times hereinafter mentioned within the forest preserve of the State of New York.

That the defendant, Benton Turner, at divers times, between the 1st day of September, 1886, and the 25th day of March, 1887, unlawfully entered in and upon the land and premises above described so belonging to plaintiff and so possessed and unlawfully cut or cause to be cut spruce timber and spruce trees, on said premises and within said forest preserve, and unlawfully converted the same into saw-logs to the number of fifteen thousand logs by count, and

23 unlawfully took, drew and deposited said logs, so cut or caused to be cut by him in "Cold brook" (so called) upon said premises situate in Franklin county aforesaid, and in and upon the borders and banks of said brook and the lands adjoining thereto, and unlawfully detains said logs from the said plaintiff.

That said logs and each and every one of them then were and are still the property of the plaintiff, and that plaintiff claims the right to immediate possession thereof.

That said logs are of the value of 33½ cents each, and of the value of five thousand dollars in the aggregate.

Wherefore plaintiff demands judgment against the said defendant for the possession and the recovering of possession of said property by plaintiff or for the value thereof, to wit: \$5,000, in case a

delivery cannot be had and also damages to the amount of one thousand dollars for the unlawful detention thereof, and in case said property is retained by the defendant pending this action for such further damages for such unlawful detention as shall be just.

D. O'BRIEN,

Attorney General,

By PETER S. PALMER,

Attorney for the Forest Commission, Plaintiff's Attorney.

Office and post-office address, Plattsburgh, N. Y.

The summons and complaint were personally served on defendant on April 11, 1887.

24 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,	} Answer.
vs.	
BENTON TURNER, Defendant.	

The defendant for answer to the complaint herein,
First. Denies each and every allegation contained therein.

Second. For a second and further answer thereto, the defendant alleges, that at all the times mentioned in the complaint in this action, he was the owner and in possession of the premises therein described.

BECKWITH, BARNARD & WHEELER,
Attorneys for Defendant.

New York Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK	}
vs.	
BENTON TURNER.	

25 It is hereby stipulated that this action and all the issues therein be referred to Hon. Richard L. Hand of Elizabethtown, N. Y., counsellor-at-law, as sole referee to hear and determine, and that an order to that effect may be entered by the clerk of Franklin county.

Dated September —, 1887.

DENIS O'BRIEN, *Attorney General,*
By PETER S. PALMER,
Attorney Forest Commission, Plaintiff's Attorney.
BECKWITH, BARNARD & WHEELER,
Attorneys for Defendant.

N. Y. Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF — YORK }
vs. } Order of Reference.
 BENTON TURNER.

On reading and filing the annexed consent of the respective parties, and on motion of the attorney general of the State of New York, plaintiff's attorney—

It is ordered, that this action and all the issues therein be referred to Hon. Richard L. Hand of Elizabethtown, New York, counsellor-at-law, as sole referee to hear and determine.

N. M. MARSHALL, *Clerk.*

26

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK }
vs. } Report of Referee.
 BENTON TURNER.

I, Richard L. Hand, sole referee to hear and determine the above-entitled action, do hereby respectfully report that having first taken the proper official oath, I have heard the proofs and allegations of the respective parties herein, and having deliberated thereupon, I do find the following

Facts.

I. The southeast quarter of township 24, great lot one, Macomb's purchase, situated in the town of Hariettstown, Franklin county, New York, being the premises mentioned in the complaint herein, was sold for unpaid taxes in the year 1859, by the comptroller of the State of New York, to Samuel W. Barnard and conveyed to him by the said comptroller in pursuance of such sale by deed dated December 27, 1864.

II. At the time of the sale mentioned in above finding I, Samuel W. Barnard, with one F. J. Barnard, had or claimed to have title to the land or an undivided interest therein, which interest, together with the estate and interest in said land acquired by Samuel W. Barnard, under the comptroller's deed mentioned in finding I, was conveyed by Samuel W. and F. J. Barnard to Christopher F. Norton by deed dated November 25, 1872, recorded in Franklin county, January 22, 1872, in Book 51 of Deeds, page 486.

27 III. The lands mentioned in finding I were again sold for unpaid taxes in the year 1866 by the comptroller of the State of New York, and in pursuance of such sale, conveyed by the comptroller to Christopher F. Norton by deed, dated January 22, 1873, recorded in Franklin county, February 25, 1873, in Book 57 of Deeds, page 577.

IV. Christopher F. Norton died intestate in or about 1882, leaving a widow and eight children, him surviving, his only heirs-at-law. Six of these children and heirs-at-law conveyed all of their estate, right, title and interest in and to the premises mentioned in find-

ing I to John B. Riley, December 16, 1886, who conveyed all his estate, right, title and interest therein, December 27, 1886, to the defendant.

V. June 20, 1877, John D. Spicer, and another, recovered a judgment against Christopher F. Norton for \$59,178.28, the roll whereof was duly filed and said judgment docketed in the office of the clerk of Rensselaer county on that day, and a transcript thereof was duly docketed in the office of the clerk of Franklin county, June 21, 1877. In pursuance of an order duly made by the supreme court, and also a decree of the surrogate's court having jurisdiction in the premises, execution was duly issued on this judgment to the sheriff of Franklin county, April 28, 1887, under which execution, on June 18, 1887, the said sheriff sold all the estate, right, title and interest which Christopher F. Norton had in and to the premises mentioned in finding I, June 21, 1877, or thereafter acquired, for the sum of \$6,000 to the defendant, and on the 19th day of February, 1889, said sheriff duly executed and delivered to the defendant a deed of conveyance of the land so sold to him.

VI. October 12, 1877, the premises mentioned in finding I were sold by the comptroller of the State of New York for unpaid taxes, being taxes for each of the years 1866, 1867, 1868, 1869 and 1870; and also for school taxes for 1869 and 1870 (including highway taxes for all of said years), amounting in the aggregate, with interest 28 and expenses of sale, to the sum of \$1,266.46. At such sale, these premises were bid in by the comptroller on behalf of the plaintiff and thereafter conveyed by the comptroller to the plaintiff by deed, dated June 9, 1881, which deed was recorded in Franklin county, June 8, 1882. The two years allowed by law for redemption from such sale, expired October 12, 1879.

VI-. The title acquired by the plaintiff to the lands mentioned in finding I, under and by virtue of the comptroller's deed, mentioned in finding VI, is the only title shown or claimed by the plaintiff on the trial of this action.

VIII. No proof has been made in this action that the plaintiff, as purchaser at the tax sale of 1877 or otherwise, served or caused to be served upon any person during the two years allowed by law for redemption from such sale any notice under the provisions of section 68 of chapter 427 of the Laws of 1855.

IX. Neither the plaintiff nor any officer of this State on its behalf ever took actual possession of the lands mentioned in finding I, or was in the actual possession thereof when this action was brought.

X. The premises described in the complaint and in finding I above, are wild and uncultivated and unimproved forest land, uninclosed, with no dwelling-house or other building thereon. In the northeast part thereof at all times since about 1862 there has been a natural meadow or "beaver meadow" extending into the adjoining quarter of the same township and also across the township line into the adjoining county. This is a narrow strip lying along the sides of a stream called Rogers brook, and containing in all about ten acres, having an average width of about eight rods, four or five acres

of the whole lying in the southeast quarter of the township about one acre in the adjoining county, and the remainder in an adjoining quarter of the township. The land is low and wet so as to be

29 inaccessible with horses, except when frozen in the winter, and is covered with water from the melting snows for a variable period of each spring. The surface is more or less occupied with clusters of alders and other bushes and a wild grass, available as food for cattle but not for horses, grows naturally where the bushes do not exclude it. No human habitation or public highway has ever existed within three miles of it, and no private road was ever made to it, except as teams of lumbermen passed through it in the winter. Such grass, the natural product of this piece of land, could be made into hay, and was of some value and an article of merchandise to some extent in that region.

The entire southeast quarter of township 24 contains 7,500 acres of land.

XI. About 1860, one Harvey Moody, residing about six miles from the natural meadow mentioned in finding X, above, entered thereupon and cut the grass growing upon that part of the meadow lying beyond the premises described in finding I, stacked the same upon the surface, and in the following winter drew it away. He did the same for one or two succeeding years, and about 1862 extended his cutting over that part of the meadow lying within the limits of the premises described in finding I. Each year thereafter until his death in April, 1880, he entered on this same land and in like manner cut the grass and left it in stacks upon the premises until the winter season following, when he, or persons to whom he made sales of a portion of it, drew it away. On two occasions during this period he scattered a little grass seed upon the surface, one peck of "herdsglass" on one and a like amount of "redtop" on another occasion. The redtop grew to some extent, and the quality of grass afterward cut was slightly improved thereby. The herdsglass did not grow. On two occasions during this same period of about seventeen years Moody burned over the dry brush and stubble. At some time a slight dam was constructed by throwing poles

30 across at a point where Rogers brook, which runs through the entire length of this beaver meadow, passes between two large stones, and Moody, by the use of a slab or two and these poles, obstructed the flow of the stream at times so as to overflow about half an acre of the land. Nearly or quite every season, when cutting the grass, Moody cut away more or less of the bushes and thus enlarged somewhat the surface occupied by the grass, but such cutting on the one hand and the natural growth of the bushes on the other made the amount of surface which could be mown variable, some years more and some years less. The acts of Moody above specified were open and visible and so far notorious that the place upon which they were done was sometimes designated "Moody's meadows." No person except Harvey Moody cut or took grass from these premises before the year 1880. The amount so taken varied greatly in different years, the largest quantity being from eight to twelve tons. The grass was so cut in August and Septem-

ber and taken away in January or February of each year. No ground was ever broken upon the premises, nor any acts done by Moody upon them, except as above found. No person was, in fact, upon the premises for any purpose during the month of October, 1879.

XII. About the year 1876 Christopher F. Norton gave to Harvey Moody verbal license to cut and take away the grass from this natural meadow in consideration of the agreement by Moody to look after trespassers on township 24. Thereafter the acts done by Moody hereinbefore found were done under such license. Prior to the giving such license Moody had entered upon the premises and cut and carried away the grass without claim of any right so to do and without asserting or intending to assert any claim to the same as against the owner. His acts were simple trespasses. The license so given to him included no right to occupy the land, but was a definite license for the definite purpose specified, and no other was claimed or exercised by Moody. It gave him no right to cultivate, to inclose, to possess the land or to build upon it. All work done by Moody on the premises related solely to his convenience and profit in exercising the specific license given and was of no substantial character or benefit, nor was it with any claim to the use of the land as such or for purposes of any occupation thereof.

XIII. The premises described in the complaint in this action, being the same mentioned in finding I, above, were not, nor was any part thereof in the actual occupancy of any person on the 12th day of October, 1879.

XIV. A short time before the commencement of this action the defendant entered upon the premises described in the complaint, claiming to own the same, and cut and removed therefrom logs to the amount of 1,250 standards of the value of one dollar per standard, to plaintiff's damage, \$1,250. The logs so taken were the same replevined in this action and afterward reclaimed by the defendant and disposed of by him.

And I do deduce therefrom the following

Conclusions of Law.

I.

The sale by the comptroller of the State of New York of the premises mentioned in the above finding of fact, numbered I, made October 12, 1877, as found in the above finding of fact numbered VI, and all proceedings prior thereto from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served, according to the provisions of chapter 427 of the Laws of 1855, and all laws directing or requiring the same or in any manner relating thereto by virtue of the rule of evidence and limitation prescribed by chapter 448 of the Laws of 1885.

II.

32 At the expiration of the two years allowed by law for redemption from the comptroller's sale of October, 1877, no person was in actual occupancy of the premises so sold or any part thereof, and no person was entitled to the notice prescribed by section 68 of chapter 427 of the Laws of 1855.

III.

At the time of the commencement of this action, and of the entry and cutting of logs by the defendant as found in the above finding of fact numbered XIV, the plaintiff was the owner in fee of the premises described in the above finding of fact numbered I, and constructively in the possession thereof by virtue of the comptroller's deed mentioned in the above finding of fact numbered VI.

IV.

At the time of commencement of this action and of the entry and cutting of logs by the defendant, as found in the above finding of fact, numbered XIV, the defendant had no title to the premises described in the above finding of fact numbered I, and no right to cut logs thereon, and no right to the possession of the logs so cut therefrom.

V.

The plaintiff is entitled to judgment in this action against the defendant for the recovery of the value of the logs cut and disposed of by the defendant, being the sum of \$1,250, with costs.

And I do hereby direct judgment accordingly in favor of the plaintiff and against the defendant for the sum of \$1,250 damages, together with the costs of this action.

RICHARD L. HAND, *Referee*.

Fees.....	\$510 00
Disbursements.....	40 00
Total.....	\$550 00

Dated April 27, 1891.

33 N. Y. Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK }

vs.

BENTON TURNER.

} Judgment.

This action having been brought in replevin for a lot of logs in the possession of the defendant and claimed to be owned by the plaintiff, and to have been cut from the land of the plaintiff, and the issues therein raised by the complaint and answer having been referred for final determination to Hon. Richard L. Hand, an attorney of this court, residing at Elizabethtown, Essex county, N. Y.,

as referee; and the matter having been heard by him and the evidence taken before him; and he having rendered his report herein, which has been duly filed in the office of the clerk of Franklin county, and which bears date April 27, 1891, and the referee having found the value of the property to be twelve hundred and fifty dollars, and also having found that said property is the property of the plaintiff herein, and that the said property having been taken by the defendant into his possession after a writ of replevin had been served and the property described in the complaint taken by the sheriff of the said county of Franklin, and the said property now being in the possession of the said defendant, or having been disposed of by him, since the date of the return by the sheriff of the property to the possession of the defendant, and the said referee having found that the plaintiff was entitled to recover said property or damage in the sum of twelve hundred and fifty dollars and costs, and disbursements in this action, and the said costs and disbursements having been taxed at \$940.35, therefore it is adjudged

34 that the plaintiff, The People of the State of New York, recover of the defendant, Benton Turner, the possession of the personal property described in the complaint, to the sum of twelve hundred and fifty dollars and interest thereon, from the date of said report, to wit: the sum of eight dollars and twenty-five cents in case the delivery of said property cannot be had; and also, that plaintiff recover the sum of nine hundred and forty dollars and thirty-five cents in addition thereto, as costs and disbursements in this action, amounting in the whole to twenty-one hundred and ninety-eight dollars and sixty cents (\$2,198.60).

N. M. MARSHALL, *Clerk*.

Judgment entered and roll filed June 6, 1891.

N. Y. Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK	} Exceptions.
<i>vs.</i>	
BENTON TURNER.	

The defendant hereby excepts to the report of Richard L. Hand, Esq., the referee before whom this cause was tried, filed with the clerk for Franklin county on the 29th day of April, 1891, in the following particulars:

First. To so much and such part of the 11th finding of fact as finds or decides that "no ground was ever broken upon the premises, nor any acts done by Moody upon them except as" stated in the previous portions of the said finding. And also to so much and such part of said finding as finds that "no person was in fact upon the premises for any purpose during the month of October, 35 1879," upon the ground that each of said parts and portions of said finding excepted to, as aforesaid, is without any evidence tending to sustain it.

Second. To the 12th finding of fact, and to each and every por-

tion thereof, upon the ground that said finding of fact is without any evidence tending to sustain it.

Third. To the 13th finding of fact, and to each and every portion thereof, upon the ground that said finding is without any evidence tending to sustain it.

Fourth. To the 1st conclusion of law and each and every part thereof.

Fifth. To the 2d conclusion of law and to each and every part thereof.

Sixth. To the 3d conclusion of law and to each and every part thereof.

Seventh. To the 4th conclusion of law and to each and every part thereof.

Eighth. To the 5th conclusion of law and to each and every part thereof.

The defendant further excepts to the refusals of the said referee to make certain findings of fact and of law which were duly requested from him by the said defendant, as follows:

First. To his refusal to find the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 15th, 17th, 18th and 19th requested findings of fact, and to each of said refusals separately, upon the ground that such requested findings of fact and each of them, were duly established by uncontroverted evidence.

Second. To his refusal to find the 23d requested finding of fact, and also to his ruling thereon that "plaintiff's deed is conclusive evidence to the contrary," upon the ground that the finding
36 of fact requested was duly established by uncontroverted evidence, and because the said ruling that plaintiff's deed is conclusive evidence, is a finding of law and as such erroneous.

Third. To his refusal to find the 24th requested finding of fact, and to his ruling thereon, that plaintiff's deed is conclusive evidence to the contrary of said request, upon the ground that said requested finding of fact was established by uncontroverted evidence, and because his ruling that plaintiff's deed is conclusive to the contrary, is a finding of law and as such is erroneous.

Fourth. To his refusal to find the 25th finding of fact and to his ruling that "plaintiff's deed is conclusive evidence to the contrary" of said request, upon the ground that said requested finding of fact was established by uncontroverted evidence, and because the ruling that plaintiff's deed is conclusive evidence to the contrary, is a finding of law and as such is erroneous.

Fifth. To his refusal to find the 28th and 29th requested findings of fact and to each of such refusals separately, upon the ground that said requested findings of fact and each of them were duly established by uncontroverted evidence.

Sixth. To his refusal to find the 2d proposed conclusion of law.

Seventh. To his refusal to find the 3d proposed conclusion of law.

Eighth. To his refusal to find the 4th proposed conclusion of law.

Ninth. To his refusal to find the 5th proposed conclusion of law.

Tenth. To his refusal to find the 6th proposed conclusion of law.

Eleventh. To his refusal to find the 7th proposed conclusion of law.

37 Twelfth. To his refusal to find the 8th proposed conclusion of law.

Thirteenth. To his refusal to find the 9th proposed conclusion of law.

Fourteenth. To his refusal to find the 10th proposed conclusion of law.

Fifteenth. To his refusal to find the 11th proposed conclusion of law.

Sixteenth. To his refusal to find the 12th proposed conclusion of law.

Seventeenth. To his refusal to find the 13th proposed conclusion of law.

Eighteenth. To his refusal to find the 14th proposed conclusion of law.

Nineteenth. To his refusal to find the 15th proposed conclusion of law.

Twentieth. To his refusal to find the 16th proposed conclusion of law.

Twenty-first. To his refusal to find the 17th proposed conclusion of law.

R. CORBIN,
Attorney for Defendant.

To Rosendale & Hessberg, Albany, N. Y., attorneys for plaintiff.

GENTLEMEN: Please take notice that the within notice of exceptions to the report and findings of the referee in the above-entitled action, and to the refusals of the referee to make findings of fact and of law, as requested by the defendant, has been filed in the office of the clerk of Franklin county, this — day of June, 1891.

R. CORBIN,
Defendant's Attorney.

38 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK	}	Notice of Appeal.
vs.		
BENTON TURNER.		

To Rosendale & Hessberg, attorneys for plaintiff, and to the Franklin county clerk:

Please take notice that the defendant appeals to the general term of this court from the judgment entered herein June 6, 1891.

June 23, 1891.

R. CORBIN,
Defendant's Attorney.

New York Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK }
vs. } Case.
 BENTON TURNER.

Statement under Rule 41.

This action was begun April 11, 1887. The answer was served April 30, 1887. No change of parties has taken place since the action was begun.

39

Case.

The case came on for trial at Saranac Lake, Franklin county, before Hon. Richard L. Hand, as referee, on February 19, 1889, and was continued upon subsequent days.

The plaintiffs appeared by their counsel, S. A. Kellogg and Albert Hessberg. The defendant appeared in person and by his counsel, George H. Beckwith, Henry E. Barnard and Frank E. Smith.

During the trial R. Corbin, Esq., was substituted as attorney for defendant, in place of Beckwith, Barnard & Wheeler.

The following evidence was offered by plaintiff:

A deed based upon the tax sale of 1877, dated June 9, 1881, from the comptroller of the State of New York to the People of the State of New York, conveying several pieces of land, and among them the whole of the southeast quarter of township 24, great tract one, Macomb's purchase, Franklin county, New York, which deed was recorded in Franklin county clerk's office, June 8, 1882.

Deed received in evidence.

S. F. GARMON, called on behalf of plaintiff, testified as follows:

My business is warden of the forest preserve, and I am in the employ of the forest commissioners, and have been for about three years; the lines of the southeast quarter of township 24, great tract, No. 1, Macomb's purchase, county of Franklin, have been shown to me; they were shown to me by the defendant Turner; the timber was cut off said lot within two or three years; the defendant showed me the timber; I was there with the defendant in

January of the year the timber was cut; the lumber or timber was cut in January, 1887; the defendant told me that he was doing the cutting and lumbering in that section—the whole of it; Mr. Turner told me where the southeast quarter of township 24 was, and showed me the line.

40

Cross-examination:

He claimed the land—claimed it as his property; said that he should hold it—the right to cut; I said it belonged to the State; I said it was State land and the chances were he would have to defend himself.

It was agreed and stipulated and consented to by the defendant and plaintiff that the lumber cut on the southeast quarter of town-

ship 24 was twelve hundred and fifty standard logs, of the value of one dollar per standard, and that, if plaintiff is entitled to recover, the damages are \$1,250. It was also admitted by the defendant that a writ of replevin was issued, and that the logs were taken back by the defendant, and that defendant has disposed of them.

Plaintiff rested.

Defendant to maintain the issues upon his part offered the following documents, all of which were received in evidence and marked as exhibits:

1. Record of a deed from the comptroller of the State of New York to Samuel W. Barnard, based upon the 1859 tax sale, dated December 27, 1864, conveying southeast quarter township 24, great lot one, Macomb's purchase.

2. Record of a deed from Samuel W. and F. J. Barnard to Christopher F. Norton, dated November 25, 1872, recorded in Franklin county clerk's office on January 22, 1873, conveying southeast quarter of township 24, great lot 1, Macomb's purchase.

3. Record of deed from comptroller of State of New York to Christopher F. Norton, based on 1866 tax sale, dated January 22, 1873, recorded in Franklin county clerk's office February 25, 1873, conveying same land as above.

4. Judgment-roll in an action brought in the supreme court of the State of New York by John E. Spicer and John D. Spicer against Christopher F. Norton. Judgment entered in Rensselaer county, and roll filed January 20, 1877, amount of recovery \$59,173.28.

5. Transcript of docket from Franklin county clerk's office showing the docketing of said Spicer judgment in said county on June 21, 1877.

It was then admitted by both parties that Christopher F. Norton died intestate in 1881 or 1882, leaving a widow, Charlotte M. Norton, and eight children, namely: Mary A. Thomas, Helen C. Norton, Sarah M. Norton, Carroll F. Norton, Benjamin Norton, Henry Norton, Christina Norton and Christopher F. Norton, the last two being infants and all the others of full age.

6. Order of supreme court made April 23, 1887, allowing execution to issue upon the Spicer judgment.

7. Decree of the surrogate of Clinton county made and entered April 18, 1887, allowing execution to issue on Spicer judgment.

8. Execution on Spicer judgment issued to sheriff of Franklin county, April 28, 1887.

9. Sheriff's certificate of sale dated June 18, 1887, showing sale of southeast quarter, township 24, grant lot 1, Macomb purchase, to Benton Turner for \$6,000.

10. Sheriff's deed dated February 19, 1889, conveying to Benton Turner southeast quarter township 24.

11. Two quitclaim deeds from all the adult children and heirs-at-law of Christopher F. Norton to John B. Riley, both dated December 16, 1886, and conveying all their interest in southeast quarter of township 24.

12. Deed from John B. Riley to Benton Turner dated December 27, 1886, conveying southeast quarter of township 24.

13. Abstract of title made and certified by clerk of Franklin county showing record title to southeast quarter of township 24.

14. Certified transcript from the sales book in the office of the comptroller showing that the southeast quarter of township 24, great lot 1, Macomb's purchase, was sold on October 12, 1877, to the State for the unpaid county and highway taxes of 1866 to 1870, both inclusive, and school tax of 1869 and 1870.

Defendant then called SMITH M. WEED, who being duly sworn, testified as follows:

I reside in Plattsburgh, N. Y., and am a counsellor of this court; I was acquainted with C. F. Norton in his lifetime; prior to his death was for many years his counsel—practically from 1860, up to the time he left, or just before he left; I remember going with him onto this township 24 a good many times; my impression is that I went before he got his deed from the comptroller; he claimed to own three-quarters of township 24 prior to the comptroller's deed; he claimed to own from the old Gilchrist title; he claimed to own all except the southwest quarter, as I recollect it, and had for some years; some time between 1870 and 1876 I heard a conversation and agreement between Norton and a Mr. Moody as to leasing the southeast quarter; I think it was some time between 1870 and 1876; I am not able to remember when it was exactly; the talk was between Norton and Moody—a middle-aged gentleman

named Harvey Moody; that is my recollection of it; the
43 talk was about the occupancy of the southeast quarter of township 24; Norton wanted me to see about it, and he wanted to make an arrangement with Moody, and they did make an arrangement by which Moody was to look after his lands in that township, and see that there were no trespassers; and in consideration of that he, Norton, agreed to give him a lease of the meadows that he occupied on the southeast quarter of township 24; and I took a memorandum of it; and my recollection is that I afterwards drew a lease and gave it to Norton after I got back; that occurred either at the Prospect house or somewhere near Big Clear pond; Norton had a house there where there was an old saw-mill; my recollection is that it was at either one of these two places that that conversation occurred; he agreed that Moody should occupy and use the meadows, and in consideration of Norton's permission for his doing so he agreed to look after trespassers on township 24; Moody said in the conversation with Norton that he had used the meadows for a good many years and had made them what they were and that he wanted a lease of them; and then Norton made a lease to him as I have stated; I understood from the conversation that there were a good many acres, but I don't remember how many; I did know at the time, for I took a memorandum of it; I understood from the conversation in a general way that Moody had used the land and been in the habit of cutting grass, and that he ought to have a right to it now if they were to be leased to anybody.

On cross-examination Mr. WEED testified as follows:

My recollection is that the talk was about the southeast quarter ; my impression was that all the meadow was in the southeast quarter and always has been, and I never heard it questioned till a day or two ago, but I don't know anything personally about it ; I never knew anything about the intervale land ; I had an idea that it was originally wild grass ; I think the old man, Moody, went on to quite an extent telling Norton what he had done, and that is the
 44 only information I had about it ; nothing was said about ploughing that I recollect at that time ; I don't know whether the lease was ever signed ; I drew the lease and gave it to Norton ; I don't know that Moody ever went into occupation under such lease, except the talk between them and the fact that I drew the lease ; they agreed to it there and I agreed to reduce it to writing, and I did so and gave it to Norton ; I did not understand that Moody lived on the land ; I did not know at the time where he lived ; I got an impression it was two or three miles away ; I did not understand that the meadows were fenced.

On the redirect Mr. WEED testified as follows :

I have no recollection of hearing a talk between Moody and Norton except that one time, and I don't know that there was anything said at that time about building a dam ; Moody in the conversation said a great deal about what he had done cutting brush and so on, and had mowed it a good many years.

JAMES PHILBROOK, called by the defendant, testified as follows :

I am fifty-two years of age and reside in Harriettstown, and have for twenty-five years ; I am acquainted with the southeast quarter of township 24, and have been acquainted with it twenty-three or twenty-four years ; I first became acquainted with it through guiding parties there fishing to a brook called Rogers brook, and more recently have been there helping to draw hay off the meadows in the winter time ; I know where the county line crosses the meadow, and I know where the division line is ; I know by hearsay that such a line was the line ; the line is marked by blazed trees, and the trees are blazed on the county line, and the south line is blazed through in the same way ; I have been acquainted with this land

so as to know where the lines crossed for six or seven years ;
 45 I don't know as I can swear positively as to the years when

I first knew anything about hay being cut there or drawn from there ; as far back as twelve or fifteen years ago I bought some hay from Mr. Moody that was on the meadows, and went in and drew it off ; that was Harvey Moody ; I recollect him, and the time of his death ; I was present when he died ; it was, I think, the 23d day of April, 1880 ; I had been acquainted with this meadow prior to that, and with the fact that hay was cut on it ; I bought and drew hay from there before 1880 ; I think I had some hay from there in 1877 or 1878 ; it was wild hay, such as grows on beaver meadows there ; there was redtop on it, but no timothy nor herdsgrass ; I have been a farmer ; redtop does not grow on these beaver meadows unless it is seeded or put there, usually ; I do not know of

this land having been ploughed or tilled by Mr. Moody; I saw hay standing on the meadows; saw Mr. Moody there at work, cutting hay; I never saw him burn the meadow over; I saw the meadow burning there in 1875 or 1876; I cannot say whether it was burned over the year before Moody's death; he occupied it the year before he died; I know there was a dam put in there prior to Moody's death; the dam was so constructed that it might have flooded this beaver meadow; there were boards put on to flood the meadow; when the boards were off the meadow would not be flooded; when they wanted to flood the meadow they would have to put the flush boards on; I never saw Moody cutting brush or stubble in the meadow, but I know that brush or stubble was cut by somebody; this cutting of brush or stubble appeared to have been done about every year when they cut hay there; somebody did it about every year when they cut hay; when this hay was cut it was stacked on the meadows; it was removed in the winter time after the ice had formed; I do not know of any one except Mr. Moody cutting and taking hay from that meadow; I do not know of any interference or disturbance of his occupancy and use of those meadows; I am the husband of Polly Philbrook, who was a daughter of Harvey Moody.

46 Defendant offered in evidence a deed from Harvey Moody and Lydia Moody, his wife, to Polly Philbrook and Fayette Moody of Harriettstown, dated April 15, 1880. Deed received, marked Defendant's Ex. D.

The land described and conveyed in this deed is the same meadow as that occupied by Moody; since this deed was given to my wife and Moody, my wife and Moody and myself continued to occupy and take care of the premises the same as old Mr. Moody did.

Cross-examination:

I do not know the actual measurement by acres of these meadows; I never measured them; I never ran through the division line between the two quarters; I know where they say the division line crosses these meadows; I know where the line which was pointed out to me as the division line crosses these meadows; the brook called the Rogers brook runs into both quarters; the brook in its general course runs about northwest; the dam falls on the upper quarter—the northeast quarter—I should say ten or twelve rods east of the line in the northeast quarter of the township; I could tell better by the map; the dam is east of the division line; the division line runs east and west; the dam is south of the division line; I correct myself; the dam is located on the southeast quarter, ten or twelve rods from the line; the brook before it comes to the division line does not run at all in the northeast quarter; it is altogether in the southeast quarter until after it passes the dam to the division line; some five or six acres of these meadows lie south of the division line, and about three or four acres lie north of the division line; all together some eight or nine acres, I should judge; I made an affi-

davit to the comptroller that there was about twenty-five acres of land in the Rogers Brook meadow in 1888; I had reference to what was actually mowed; to the extent of the meadows; I should think

there would be about two-thirds of the meadows south
47 of the division line, and the other third north of the division line; I estimate the number of acres of the meadows south of the division line to be five or six; I make a distinction between mowing land and meadow land in this case; if it was all mowing land from one side to the other it would be a good deal larger than it is now; there is not as much meadow now as there ever was; there is not as much meadow now as there was in 1879; I should think it would be nearly a third more in 1879 than now; this is owing to the growth of bushes and alder since then; I never knew the dam was used for any other purpose than flowage of the meadows; no timber or logs is run on the brook; this meadow land is situated in a natural swale of low ground, not very boggy; there are some stumps on this meadow land; I should say the stumps of first-growth trees; the character of the stumps indicates tamarack timber; the stumps are not very numerous; quite large; I should think the original growth of the trees on this meadow land was a cedar and tamarack—soft timber; I don't know when that was cut off; I don't think there was ever much of it cut; the stumps appeared as though the trees had died and fallen, most of them; once in a while I saw one that looked as though it had been cut with an axe; I only guess that cedar stood there because there is cedar all around the edges; this meadow land does not appear to have been overflowed much; the soil is a kind of dark loam or muck; it does not appear to have been turned over by the plough or spade; the upper meadow is inaccessible in summer time with teams; only accessible in winter time; no highway passes near it; it is some three miles from the highway; nearly three miles from any residence; the nearest residence is Mr. Ames'; Harvey Moody lived six miles away from it; I lived six miles away from it when I received the deed from Harvey Moody; I resided in Franklin county; Harvey Moody resided in Essex county; I do not recognize

the photograph shown me as a photograph of any portion of
48 these meadows; I know where they say the corner is in the division line between the two divisions; I know where it has been pointed out to me; I cannot say whether it is near the two birch trees that appear in the front of the photograph; I do not recognize these trees as blazed trees; I think I recognize the knoll upon which these birch trees grow from this photograph; I have been there; that knoll is from ten to twenty feet above the meadows; the meadows come to within ten or twelve rods of the birch trees; I do not know that the two birch trees in the photograph are the trees which indicate where the division line strikes the county line; they may be near the line, but I cannot swear to it by the looks of the trees; I do not know that anything indicates where the division line between the northeast and the southeast quarter of township 24 strikes the Essex County line; the meadows are near the supposed northeast corner of the southeast of township 24; I

simply recollect that the division line crosses the brook; there used to be some blazed trees there that they said was on the line; I do not know but they are there yet; I have seen them sometimes when I have been there; I don't know particularly when; I don't know how many trees were there at the brook to indicate where the line was; I have seen two—one on one side of the brook, and the other on the other side, a short distance apart; a few rods; six or eight rods, in my judgment; I think one of these trees was a spruce tree and the other a balsam; they were smallish trees, anywhere from four inches up to six or eight; they had the blaze of an axe; I don't know whether they had it on both sides or not; line trees generally have a mark made on both sides where they stand right on a line; where they stand a little on one side they don't generally mark but one side; they mark the side nearest the line when they stand near the line; such a tree is generally called a line tree, except on a corner; they are called witness trees; I could not say whether these trees were spotted on both sides or one, or on which side that were spotted; I never followed the lines through; never had any interest in it and had no occasion to; I cannot say that I know the exact location of the line; I was never there with any surveyor; I do not know when the line was made or who made it; I do not know how old these trees were; they were quite old looking; I cannot state from my own observation that the timber on these meadows were ever cleared away by any human being and made into meadow; it has been cleaned up a good deal, I should say, since Mr. Moody began to cut hay there—more especially since he took pains to burn it over and cut some of the brush—alders and smaller brush that grew on these meadows; I do not know of any one doing anything upon these meadow lands prior to Mr. Moody; there is no indication of a shanty or house being built; I cannot say what amount of hay has been cut in any one year prior to the time of its being cut when my wife purchased it; all I can judge about is what has been cut since; in my judgment I should say there was eight or nine tons cut there in 1876; some years not so much; some years better than others; I never cut any there before my wife purchased it; I drew some from there but never cut it; I made an affidavit in 1887 and it is correct in regard to the hay cut on these meadows; I made an affidavit that I had cut wild beaver meadow hay on the southeast quarter of township 24 on Rogers brook for the last six years previous to 1887, the first year being 1881; I think I cut about four tons a year; I made this further statement in the same affidavit: "I didn't cut this hay by or under any agreement with any one; I did not suppose there was any harm in cutting said hay;" I presume this is true; I also said in the affidavit that I never made any improvements on the southeast quarter of township 24, and that I had never been notified as an occupant to pay taxes on said land or any part of it; it is true that I never paid any taxes and was never requested to; I also stated in the affidavit that Mr. Van Buren Miller said to me verbally in the summer of 1885 that if I cut more hay on the meadows above mentioned I

would have to pay something for the same; I replied that it was all that it was worth to cut and draw the same; I have never paid anything for the hay; that is all true; I also stated in the affidavit, "I never cut any hay or did any other act for the purpose of making a claim or making a title for myself or any one else for the southeast quarter of township 24, 'McComb's purchase, great tract 1;'" that is also true; the grass that I speak of as growing on these meadows was rather short grass; I presume a foot high; it seemed to be natural grass and grows on all the swamp lands in this region; I said that I understood that redtop did not get into meadows there unless it was seeded; I said that as I understood it; I have no personal knowledge as to whether that is the fact or not; I have known of redtop being seeded on meadows in this section; market hay in this section of the country is timothy and clover; redtop and wild grass is not considered market hay; they use a good deal of it there; it is not market hay; it is used for stock purposes; I do not know that redtop is a species of wild grass; I don't know whether the seed for redtop has to be sowed or whether it comes up naturally.

On redirect examination Mr. PHILBROOK testifies:

Mr. Albert Turner, who was connected with the forest preserve as I supposed, got me to make the affidavit; he said his object was that the affidavit be made to show that I did not own any land there; simply that I had a right to cut the hay, and I supposed I made an affidavit in accordance with that; he read the affidavit to me, or pretended to read it to me; I did not read the affidavit myself; when I stated that I did not cut the hay under any agreement or contract with anybody, I meant that I had a right to cut the hay according to the agreement with Mr. Moody; I had a right to cut the hay under that deed; the hay grown on these meadows is the kind of hay sold in this country more or less.

51 DANIEL AMES, called on behalf of the defendant, testified as follows:

I reside in North Elba, three miles from the county line between Franklin and Essex counties; have lived there something over thirty years; am acquainted with the southeast quarter of township 24; I think the first time that I undertook to trace the lines to any particular part was in 1856; not all of them; in that year I was on there with another party; we were sent to find the division line between the southeast quarter and the southwest quarter; we started from the northeast corner of the southeast quarter; we run through to the division corner of these four lots in the centre; then we didn't find any other trees that showed it was ever run through to go west, and we found no line running from there south; that was in 1856; we found the division line between the southeast and southwest quarter; I have been on the county line; that was the south line of the township; I don't know as I have been on the county line but once; that was in 1862; then I was there with Mr. Tefft; I am acquainted with the meadows there; I passed them a

good many times; I was there on the premises the first time, I should think, in 1858; I was acquainted with Harvey Moody; I bought hay of him off this southeast quarter; I think it was in 1875; I bought one stack; the character of the hay was different kinds, such as grows on low meadows; some of it fallow meadow, but I suppose redtop; I have gone through those meadows drawing logs, and I should think it was a hundred rods through them; I saw the dam on the brook; Mr. Moody showed me the dam; Mr. Norton used to employ me to look over his lands; he said that he had given Harvey Moody the privilege of going there—I don't know in what way—to cut the hay; he never told me what the bargain was; he, Norton, wanted to know if Moody had burned the timber, and if the fire had got out so as to do any damage; Norton

asked me if there was any danger of fire coming out from the clearing that land on the southeast quarter; nobody occupied any of this meadow land from 1862 until Mr. Moody's death except Mr. Moody, so far as I know; I saw Moody's folks drawing hay away from there; I was there during the winter lumbering; I recollect where the dam was; I am acquainted with the lands; the dam was on the southeast quarter wholly; the dam was built by Mr. Moody; he said so; I think it was built not far from 1874 or 1875; it was not a great while before Norton did business there; I saw Moody draw hay from the meadow frequently; I never saw him in it; I was most always in this section of the country in the lumber business—all along from about 1850 to 1870; my lumber road went through the meadows; I used these lumber roads in 1866, 1867 and 1868; I went through the meadows in 1869; I bought a stack of hay there in 1875; a good deal of that kind of hay is bought and sold like other hay in the community; I know the alders and stubble and brush were cut and taken away from these meadows; but I don't know who did it; when I first saw the meadow it was almost all brush.

Cross-examination:

(Photograph shown witness.) I do not recognize that photograph as a photograph of one of these meadows in question; those meadows in the days I speak of were covered in spots with brush and alders; there were places near the brook that were never cleared up, and the meadows were, when I first knew them, covered in spots with alders and brush; the brook runs right through the meadows; I do not know whether there was any original timber on these meadows there; there were no indications of it that I know of; when I first knew the meadow it was mostly alders; there was some tamarack growing on it, but most of it dead; that was as far back as 1858; somewhere about 1857 or 1858 I was on there and drew logs through these meadows; I have no recollection of seeing any hay cut there at that time; I don't know as there was the same character of grass growing there at that time as when Moody occupied it; the first time I was there was in the winter time; I have no recollection of seeing any stack of hay there until some-

where along about 1865 or 1866; all the occupation that I know of, and that causes me to make up my mind that it was occupied at all, was simply the cutting of the brush and alders; I never paid any attention to the number of acres cut over in this way and used in this manner; I have heard there was about nine acres; I should suppose there were as many as ten or twelve acres, but I was not looking to see how many there were; these meadows north of the line run through into Essex county; somewhere about an acre, I should judge, of the meadow is in Essex county; I am a farmer; as to redtop, I suppose it is tame grass and it is sometimes sown; I have known people in there to sow it; I don't think it would come naturally into the soil after the soil had been moved over and the flat grass cut for a number of years without some seed of some sort; I have no knowledge from observation or experience on the subject; the flat grass comes from the same cause that trees come from; perhaps the redtop might come in the same way that the first grass does; I have redtop on my farm; never have sown it; the grass seeded here when people cultivate their land is mostly timothy and clover; I have known redtop sown occasionally; redtop when it comes into the soil stays like wild grass; it is perennial; herdsgrass or timothy does not stay in the soil like wild grass or like redtop does; it runs out and other grass takes its place; I think redtop would be apt to stay in the ground longer than herdsgrass; I think the redtop would be apt to stay longer in the ground than herdsgrass; I was across these meadows this fall; I have looked upon these meadows from near the corner where the division line strikes the county line.

Witness again shown photograph, and asked if he recognized the two birch trees as near the corner, and said: There used to be one there; when I last stood on that corner when I was there
 54 you could not look down on the meadow on account of the trees; when I first went to that corner you could not see the meadows, because there was a quantity of bushes between you and the meadows; I am not able to state of my own knowledge that there was anybody on those meadows in 1879 or 1881 for any purpose.

Redirect examination of witness:

I have used redtop on my farm; fed it out there; the redtop that I bought in 1875 from Mr. Moody was fed out on my farm; I never was acting for Mr. Norton as agent, but I was acquainted with the land and drove around through that country; in 1866 I went for Mr. Norton to look up some lots for him, and went through these meadows; he sent me there before he bought it.

ROBERT MOODY, called by the defendant, testified as follows:

I am a son of Harvey Moody; he died in April, 1880; I am acquainted somewhat with these meadows spoken of here in the southeast quarter of township 24; I drew hay from these meadows for Mr. Moody in the year 1879; I never cut any; I drew about twelve

tous ; I drew the hay along in January and February—I couldn't say which—of 1880 ; I drew before that time two or three years right along ; I helped to draw it each year ; drew it to my father's place ; that is six miles from the meadow ; I do not think the hay we cut on Kinneys brook was as good as this was ; I drew the hay for my father probably a month and a half before his death ; I drew the last of it in 1880 ; I drew hay also in 1879 ; I recollect the time because I know the man that helped draw it ; the crop of 1879, which I drew away in 1880, it took us about two weeks to draw it, two trips a days, double team ; I know that my father burned the meadow over ; I could not say what year ; it was two or three years before he died ; I helped him burn it one spring three years before he died.

55 Cross-examination :

I don't know anything about the division line between the two quarters ; I know where the county line is ; I think there was some hay drawn on each side of the division line, if I am not mistaken ; I am twenty-four years old ; in 1879 I was fourteen years old ; I never cut any hay there myself before my father died ; I have since ; the hay cut there was put up in stacks ; I could not say how many stacks ; I think the hay cut in 1879, and prior to that time, was stacked on both sides of the division line ; I remember there being a dam there, but I don't remember who built it ; I do not recognize these meadows from the photograph shown me ; there were alders and brush in the meadows scattered around the same as appear in the photograph at the time when I hauled hay away from there ; I don't know of Mr. Moody ploughing those meadows or sowing any seed there ; I suppose the character of the hay there now is the same as it was at the time I began to work there ; a pretty good deal of it redtop ; it is what we have to feed our stock ; the proportion of wild grass and redtop is about half and half ; I don't remember seeing any herdsgrass in it ; I haven't much of an idea how many acres there are ; I should think there were ten ; I have never mowed it but one summer when I helped my brother.

MILTON SMITH, called for the defendant, testified as follows :

I am forty-three years of age ; I live in the town of North Elba, in Essex county ; the county line is one of my lines on the west side of my lot ; I am somewhat acquainted with the southeast quarter of township 24 ; have been acquainted with it about twenty years ; there was a beaver meadow there when I was first acquainted with it ; Harvey Moody claimed to be occupying it at that time ; he continued to occupy it until the year of his death ; I know there is a dam there ; as to the seeding of it, they stopped at my landing once in 1876 with a bag of seed, that is to say, Harvey Moody and other parties, I don't recollect who ; I saw a bag with them, but did not see what was in it ; they went in the direction of the meadows.

Q. If they stated that they were going to seed those meadows, state what they said in regard to it.

Objection as immaterial, irrelevant and improper; not a fact, and hearsay; objection sustained and exception.

I saw smoke after Moody left on this land; the smoke was in the direction of the land; I think it was in 1876; I have cut and hauled hay from the land; prior to the death of Mr. Moody I helped to draw hay from there; I think it was in 1868—twenty years ago; I bought wild hay of Harvey Moody, and drew it from the meadow to my barn; I saw Harvey Moody cut and draw hay from there the year before he died; I was up and saw them cutting hay and stacking it; Harvey Moody was there and some of his boys; I think his boy Fayette was with him; I have seen them off and on for different years, cutting the grass; I have seen them about every year drawing and nearly the same number of years cutting; there was some redtop in the grass; redtop is not very natural in these meadows, only as it is put in in seed; that grass is bought and sold in that vicinity for feeding cattle, and not for horses.

Cross-examination:

I think it was the year 1876 that I saw Moody going over to these meadows with the bag; I had mowed grass there prior to 1886, namely in the year 1868; I bought hay from there some two or three years prior to Moody's death; the grass I bought was of the same character as I mowed in 1868; saw no difference in quality; I do not recollect there was any redtop in the grass in 1868; there was no redtop in the grass which I bought; I
57 should think there was something very close to 25 acres in the interval; I should judge there was something near ten acres cut over from my earliest recollection; I know where the division line is between the two quarters; north of the division line some years more and some years less was cut on account of the water backing in the river; I do not know how many acres there are on the north quarter; I should say five or six acres, or in that neighborhood, and somewhere about five acres cut north of the division line between the two quarters; I don't know how much in Essex county; I think there is some; very little; there was rather more mowed over in 1868 than in the year I was there last; there was a meadow down by the division line—a small meadow, I should say, that had increased since 1868; I think there was more there a year ago than there was in 1868; possibly an acre more.

ALBERT GOODSPEED, called for the defense, testified as follows:

I live in North Elba, about three miles from this southeast corner of 24; my mother married Harvey Moody; I have been acquainted with this southeast quarter since 1877; I recollect the meadows there and that Mr. Moody cut grass on it and that he drew it away; I have worked on it myself; worked on it in the years 1877, 1878 and 1879; I was mowing grass and helping to haul it; I helped Mr. Moody burn it over in the years 1877 and 1878; I know there was a dam there; I know Mr. Moody fixed the dam; I helped him

do it; it was in the year 1877; the character of the grass that grew there was redtop, fallow meadow; it was flat grass and very little herdsgrass scattered through it; I should think there was nine or ten acres cut over.

Cross-examination:

When I speak about nine or ten acres I mean all that was mowed over; we generally cut it in August and September; the dam is not very large nor very long; it may be eight or nine feet at the top and about four feet high; it was made of nothing but poles laid across and some driven in, with some brush put in and some few pieces of slabs; it was an old concern when I saw it; when my father fixed it, it raised the brook so as to flood the meadow in some places, and some places it did not; it flooded a half acre or more; father burned the old stubble and dry brush and stuff; the dry brush that was standing; there was quite a lot of it; there was green brush standing, scattered over the meadow in places; we mowed around this green brush in some places; the brush was mostly alders; sometimes the alders would not be thicker than your finger, sometimes thicker than your wrist, and six or eight feet high; the meadow was covered in separate bunches here and there; we did not burn up onto the hard land any; the brook is ten or fifteen feet wide; I do not know how much of these meadows lay over in Essex county, or how much lies north of the division line between the two quarters; (witness shown photograph) there are some things on it that look like the meadow; I can recognize the meadow from the photograph; the meadow we have been talking about and the lands that have been cut over; the proportion of the meadow we mowed below the dam might have been five or six acres; the meadow is a long, narrow strip; I do not know how wide; I should think it was eight or ten rods wide on an average; might be one hundred rods long; that is the total both sides of the dam, from the dam to the upper portion of the meadow, is I think, sixty rods; from the dam to the lower portion of the meadow might be forty rods.

Redirect examination:

Mr. Moody stacked the hay three different years after cutting it and left it on the ground; it was not drawn away until the ground froze up.

HENRY WOOD, sworn for the defendant, testified:

I live in North Elba; have lived there fifteen years; it is forty or fifty rods from the Franklin County line where I live; I am acquainted with what is called the Rogers Brook meadows; Harvey Moody occupied them and used them; the meadows he used and occupied are the Rogers Brook meadows; I have been acquainted with them ever since a number of years prior to the war; they are in the southeast quarter of township 24; I know of Mr. Moody seeding these meadows down; helped him to

seed them down; I fetched him grass from Keeseville, from my old farm in Keene; the first seed I fetched was herdsgrass, the next was redtop; I was present and saw it sown, and helped to sow it; it was sown on these meadows in different parts of the meadows.

Cross-examination :

I should say that was two or three years prior to the civil war; Harvey Moody was with me when the grass was sowed; we sowed a half bushel—one peck of redtop and one peck of herdsgrass; one kind of seed one year and the other the next; I cannot say how much below the dam nor how much above; it was scattered around as the case might be; we took the grass seed and sowed it right along; we went over pretty near the entire meadow, both sides of the dam, above and below; there was no dam there at that time; I know where the dam is now; at that time there was a growth of wild grass there; there was blue-jack there; I don't think there was redtop growing there then; I did not notice any redtop at the time we sowed; I am something of a farmer; redtop will come up when it is sowed; I don't think it will come in without sowing; there are some men who do not know the difference between redtop and June red; I do not think redtop will come in unless sowed; that is my judgment; I am not the owner of a farm; I have owned one, eighteen years ago; owned it two or three years; located at Keene; one hundred and four acres; had no redtop on it; I have more or less during my whole life been on a farm at intervals; I mean at intervals and on intervale land; I call low land intervale
60 lands—land that is sometimes flooded, land that naturally raises wild grass; I work every year upon farms; I have worked as a hired man on shares; my age is fifty-nine; I am not a lumberman; I have worked in the lumber woods; I say June grass comes into the ground naturally; the distinction between June grass and redtop is that June grass is a great deal shorter; it is more wiry and short; it looks something like redtop, only nothing near as big; I can tell the difference between them; it is easy to distinguish them; any farmer would know one from the other.

Redirect :

I live on a farm now; have grass on the farm; my wife has a farm in this town.

Recross :

I do not know that any of these meadows were burned over for the purpose of seeding; they did not appear to have been ploughed, or to have been turned over by any appliance; no turf cut; no turning over by the spade; some roots were cut out with an axe where the brush had been cut down; we didn't put the redtop in these spots; we sowed the seed right on top of the wild-grass turf; I do not think that the herdsgrass that we sowed did much; the ground was too wet; no herdsgrass to any amount; the redtop

did well on top of the wild-grass turf; some of this intervale land is boggy and some is not; it is overflowed in certain seasons; considerable water comes down from the hills from each side; it lies then under water, sometimes longer and sometimes shorter, according to the season of the year and the snow we have; in some places it flows over the meadows about every year; from the upper end of these meadows to the lower end I should judge there was about six feet fall; this Rogers brook runs through about the center; maybe thirty rods from where the dam was subsequently built to the lower end of the meadow; I cannot say how far to the upper end; the county line crosses near the upper end of the meadow; a
61 small piece of the meadow is over in Essex county; I do not think there is an acre; I do not know where the division line between the two quarters is; it was never pointed out to me; we did not mow any further than the grass let us; there was no grass on the hard land.

It is admitted that the original records on file in the treasurer's office of the county of Franklin prior to 1872 were burned.

AUGUSTUS TORRANCE, called by the defendant, says:

I am seventy-three years old; reside in Harriettstown, Franklin county; have resided there since 1858; have been assessor of the town of Harriettstown; was assessor in 1867, 1868, 1869 and 1870, through all of those years; was assessor at the time when George Ring was.

Q. During any of those years, 1866 to 1870, state whether you verified the assessment-roll prior to the third Tuesday of August.

Objected to by plaintiff as immaterial and investigation in this line prohibited by chapter 448 of Laws of 1885, and on the further ground that the assessment-roll should be produced, which is the best evidence as to whether or not it is verified.

Defendant replies that said law is invalid by section 1, article 14 of the amendments to the Constitution of the United States; objection sustained; defendant excepts.

Defendant offers in evidence a copy of the assessment-roll of 1867, which plaintiff admits is the copy which was filed with the county clerk for that year, marked "Defendant's C."

Plaintiff objects as last above; defendant replies as before; referee admits evidence for the present.

I was assessor during the time that Mr. John Howes was
62 assessor; the assessors did not meet on third Tuesday of August in the year 1870 to review the assessment-roll; that was the last year that John Howes was assessor.

Plaintiff objects, on the ground that the deed is conclusive evidence of all proceedings prior to the sale; on the ground that it is immaterial; on the further ground it is not shown there was any grievance on the part of any citizen that made it necessary for the assessors to meet; overruled for the present.

In the year 1870 I was at the place appointed to meet, and no one came through the day; no assessor came, and no person came there with any complaint; intervale or swamp grass in Harriettstown is used for feeding stock; I know there is a good deal of it used.

Cross-examination:

It is a fact that this locality was from 1866 to 1870 a wild region and the fact that there were no fences built to surround a person's close or betterment, arose from the fact that it was thinly inhabited; it was not for a lack of fencing timber; it lies at the present day just as it did twenty-five years ago, as far as fences are concerned; that is the wild meadows that I was acquainted with, I mean. No one appeared on the day that I met to hear complaints to the assessment-roll of 1867; no grievance was made known to me as assessor; notices were put up; the only reason I know why my signature is absent from the assessment-roll of 1867 is that it is a copy and I had no business with it, I suppose; I did sign the original; all I can say is that the assessment-roll of 1867 was signed before the third Tuesday of August; I am positive of that from the conversation we had at the time; I was out there and J. Miller was there, and I spoke to Van Buren Miller concerning it, and he said it would save another trip coming out here, and it will not make much difference anyway; don't know as it will make any; and the assessment-roll was signed;

63 both signed at the same time those other parties signed; I did not sign a copy, because I never signed a copy of any assessment-roll: my name is Augustus Torrance; that is not my signature to the copy of assessment-roll shown me; I think that is not the writing of J. J. Miller; I am quite positive that I signed the original assessment-roll before the third Tuesday in August; we had the conversation, as I tell you, so I am positive of it; the fact that I signed the assessment-roll prior to the third Tuesday in August was not called to my attention until now; the thing was never mentioned to me before; this is twelve years ago; the fact has not been talked to me since, prior to this occasion, not till now; I was first interrogated in reference to it the day before yesterday; J. J. Miller is dead; the other assessor was there that year; he is also dead; I am the only survivor of the three assessors; the defendant, Benton Turner, brought it to my attention that we had sworn to the assessment prior to the third Tuesday in August; I recollected it immediately upon his suggesting it; after the assessment-roll was shown to me I recollected it; I had not seen it before that time until now; Van Buren Miller was the justice of the peace before whom I made the oath; I think he is living.

JOHN HOWES sworn for defendant:

I live in Harriettstown, Franklin county; I was elected assessor in 1868 for three years; during that period Mr. Torrance was assessor also; during that period there was one year in which the assessors did not meet on the third Tuesday of August; I think

that it was either in 1869 or 1870 that I did not meet them ; I cannot tell exactly.

Defendant offers in evidence documents purporting to be the assessment-rolls of town of Harriettstown, Franklin county, for years 1867, 1868, 1869, 1870.

Plaintiff admits that records of the county treasurer's office of Franklin county previous to 1872 have been burned, and admits that documents offered are copies from the town clerk's office.

Documents received for present and marked respectively " C, D, E, F."

Defendant offers to show by witness V. B. Miller that supervisor's warrant attached to Exhibit F bears the genuine signatures of the supervisors of Franklin county for that year, 1870.

Objection by plaintiff ; immaterial, irrelevant, incompetent under law of 1885.

Defendant replies as before as to United States Constitution.

Objection sustained ; defendant excepts.

Defendant offers to show same as to Exhibit C for year 1867.

Same ruling ; exception.

Exhibit C, purported to be verified by assessors 10th August 1867.

Exhibit F had no verification or signatures of assessors.

JOHN RORKE, sworn for defendant, testified as follows :

I will be 70 years old in a few days ; I live in Harriettstown, and have for 27 years ; I have been acquainted with the southeast quarter of township 24, I should think, since 1865 ; I recollect the time when Mr. Tefft did some lumbering on that quarter ; it was somewhere from 1865 to 1870 ; he worked there two winters on that quarter.

Q. While he was lumbering there, and while he claimed to own it, did you, in any one year, work out the highway tax for him, and if so, what year ?

65 Plaintiff objects, as immaterial and incompetent ; objection overruled ; plaintiff excepts.

A. Mr. Tefft got me to work out the tax ; my recollection is that it was about 1868 ; I am sure it was after 1865 and before 1870 ; I worked it out one year.

Cross-examination :

I think it was in 1868 ; it might have been a year or two from that ; the pathmaster was Abner Baker ; I don't recollect now what the number of the district is of which he was pathmaster ; it was in Harriettstown ; the road running from Saranac Lake village to Harriettstown was in his district ; there is a large settlement at West Harriettstown, and he was pathmaster of that particular highway at that time ; I think the commissioners were Charles Manning, Mr. Noakes and another ; I was notified by Mr. Tefft to work out that highway tax ; I was not notified by the pathmaster ; the pathmaster

directed me where to work it; I worked 100 days in two different districts; I went along from the Essex County line until I got to that other district; the districts were not then numbered; I began at the county line; I worked on the highway going to West Harriettstown from the county line of Franklin county; I began at the school-house near Robert Smith's, southeast of here, and from there to Harriettstown; I worked 100 days; I could not say how many days in each district; Baker was pathmaster of one district, and I cannot tell who was pathmaster of the other; I do not know whether this southeast quarter of township 24 was assessed in two separate districts; I do know it was assessed in the other district; I have seen a record of it; I do not know how many days were assessed in 1868 upon the southeast quarter of township 24; Mr. Tefft told me to go and work out 100 days on the highway; he said that was his tax in Harriettstown; I do not know on what particular lands those other 100 days were assessed, and never did know; I do know
 66 that he owned other lands; he did not live on the southeast quarter of township 24; nobody lived on it; I have no knowledge that he had any claim there except from hearsay; I do not know whether any portion of that tax was assessed to him on the southeast quarter of township 24; I do not know whether any portion of the tax that was assessed upon the southeast quarter of township 24 was worked out by me; I understood from Mr. Tefft that he was himself assessed for 100 days in Harriettstown; that it was his personal tax that I was working out; if none of this highway tax in that year was assessed upon the southeast quarter of township 24 to Mr. Tefft personally, I did not work any of that; I knew by his talk as to where this tax that I worked out was assessed; I did not examine any records myself to find out how much tax was assessed to him, and did not examine what particular lands they were assessed to; he told me he had a large tax to work out, and wanted me to go and work it; he told me the number of days to work, and I went and worked that number of days; the pathmaster told me where to work; I forget who the pathmaster in that district was at that time; whether I was pathmaster myself at that time I cannot tell; if I was pathmaster myself in 1868, and made a report of taxes that were not worked, I made it correctly, according to my best information at that time; I am not sure that I was pathmaster at that time or not; I am pretty positive that it was in 1868; it might have varied a year from it; I do not think I was pathmaster at that time; I do not know, however, as I was pathmaster a great many times there; I do not know how much was assessed against this quarter, and never did.

Redirect examination:

Mr. Tefft lived in Plattsburgh.

Q. Did you understand from Mr. Tefft that this highway
 67 tax was highway labor assessed on his lands in Harriettstown; what did you understand it was assessed for?

Plaintiff objected, as immaterial and improper.

Objection overruled; plaintiff excepted.

A. He said it was for his lands here in Harriettstown that he was assessed, this highway tax; he did not speak particularly of the southeast quarter of township 24; he said, "I have so much tax to work on my lands in Harriettstown;" he was then here at Cold Brook; it was one of the same winters that I had been at work lumbering for him, on the southeast quarter of township 24; I think it was the first winter that I worked there in the woods; there is another district between our district and that quarter; our district was bounded by the school-house; the work done must have been 10 miles from the southeast quarter of township 24.

Recross-examination:

There was a highway district nearer to this land than the one in which I did work.

ABNER BAKER, called for the defendant, testified as follows:

I am most 54 years old; live in the town of Franklin, Franklin county, and formerly lived in the town of Harriettstown; I came to Harriettstown in 1865 and left in 1883; during the year 1868 I was overseer of highways or pathmaster in that town; I was never pathmaster for that town except for that year.

Q. State whether or not in the year 1868 John Rorke worked out non-resident tax on any of your highways for Otis Tefft.

Plaintiff objects, as immaterial and irrelevant; that no person by the name of Tefft is shown to have any interest in the
68 lands in dispute, and also that the records themselves of the taxes assessed and taxes worked is the best evidence.

Objection overruled; plaintiff excepts.

A. He did work some non-resident tax for Otis Tefft; he commenced at Alder brook, near Thomas Manning's house, and worked north between Alder brook and Two Bridge brook.

Q. Did he also work tax in Mr. Manning's district that year?

Plaintiff objects, same as last above, and also that the tax warrants themselves are the best evidence of what taxes were assessed and should be produced, and on the ground that if he worked in another district and for another pathmaster, and under the direction of another pathmaster, the best proof would be the evidence of the pathmaster under whom he worked, and also that it is hearsay in regard to any taxes worked outside of his own district.

Objection overruled; plaintiff excepts.

A. Yes, sir.

Q. Who was that for?

Same objection as before by plaintiff; same ruling and exception.

A. It was for Tefft; he worked south from Alder brook, down between there and where the school-house was at that time; that district was called district No. 2; he worked over a mile of road in that district, I think, and about a mile in the other district; I calculate he went about two miles on the whole.

Cross-examination :

I only know for whom he worked in district No. 2, or Manning's district, by what he and the commissioner (Mr. Noakes) told me.

Plaintiff moves to strike out the testimony as hearsay.

69 I did not return any unworked taxes in my district that year; there were none to return; Manning is living; I never returned any taxes that had been worked nor any non-resident land that had been worked; I do not know that Mr. Manning ever did; I have not the tax warrant with me; I don't remember what was done with it; I have made no search for it; my district, No. 1, is six or seven miles away from the southeast quarter of township 24; No. 2 is nearer, and there was another district nearer still; Mr. Tefft at that time was not a resident of this part of the country; he resided in Plattsburgh.

Redirect examination :

I have no definite recollection of the location of these several districts; Manning's district did not include 24; his district was in 21; there was another separate district in township 24; Saranac Lake district was the nearest to 24.

Q. Work was done under the commissioners in these different districts for assessments made in other districts, was there not, in the year 1868?

Plaintiff objects as irregular, immaterial, irrelevant and improper, and not the best evidence; too general to draw any presumption from; that it has no relation to what was worked or what was assessed on township 24; that the records of the commissioners are the best evidence as to where they appointed the work to be done.

The court allows the question as regarding a fact.

Plaintiff excepts.

A. There was work done that way; yes, sir.

Q. About how many miles were there in the town of Harriettstown in the year 1868?

Plaintiff objects as immaterial; objection overruled; plaintiff excepts.

A. Some 10 miles in all.

70 Recross-examination :

Q. Did the commissioners direct any work to be done on non-resident lands unless they furnished the money for it?

A. They did; Mr. Tefft paid for that work; I was not present when it was paid; the commissioners did not direct me to do any work in my district for which they did not furnish the money; they did not furnish money to do any work in my district; I did not do any work except what was on my warrant; I had no talk with the commissioners about doing any work except what was on my warrant, and had no directions from them to do any; I had directions

from Mr. Noakes, the commissioner, to oversee this work that Mr. Rorke was to do; there were three commissioners there that year; I had no talk with any of the others; there was a district lying nearer the southeast quarter of township 24 than district No. 2, and within three or four miles of it; I have no knowledge but what the commissioners discharged their duties as to the apportionment of the lands in the various districts as the law requires; my attention has not been called to this matter of the work done by Rorke, done in 1868, from that time until today; I made no memorandum of it; I have not seen Mr. Rorke today.

Redirect examination:

The work was done right along at one time, continuously, by Mr. Rorke; at the time the work was being done I understood it was being done as non-resident tax for Mr. Tefft.

OTIS A. TEFFT, sworn for defendant, testified as follows:

I reside at Sandy Hill, Washington county, and formerly at Plattsburgh; I was engaged in the lumber business on the Saranac river from 1852 to 1879; I was acquainted with the southeast quarter of township 24, McComb's purchase in Harriettstown, 71 Franklin county; the first that I paid any attention to it was in 1864; I owned it from 1864, when I bought it, until I sold to Norton in 1869; I purchased it from Barnard & Son; I did some lumbering on this quarter; the first I believe was in 1864, and from that on with one year's interval—the year I do not exactly recollect—up to 1869.

Q. Did you in any of those years, from 1864 to 1869, inclusive, work out a highway tax upon that land, or cause it to be worked out?

Judge KELLOGG: I object to that, upon the grounds, first, that the apportionment of the commissioner of highways required a record to be made of highway taxes and filed in the town clerk's office, and a distribution in the town and various roadmasters, is a matter which is regulated by the statute; those records should be produced to determine what tax, in what locality, and on what particular land they were levied.

Objection overruled; plaintiff excepts.

A. I caused it to be worked out one year to the best of my recollection, either 1867 or 1868; I do not recollect by whom it was done; I did not give any directions as to where it was to be worked out; I paid this tax at the request of Mr. Noakes, who I believe was at that time commissioner of highways; I could not tell where this tax was worked out; I supposed it was in the town of Harriettstown; I do not know that it was worked out at all; I paid for having it worked out.

Q. State how you came to pay for highway tax upon this land in 1867 or 1868.

Objected to as irrelevant, immaterial and improper, and calling for conversation or his motive in paying, and further that he has

not yet said that he paid any highway tax, and there is no evidence that he paid any highway tax; he paid some money to a man by the name of Noakes.

Objection overruled and exception.

72 A. I did at the request of Mr. Noakes, commissioner of highways in the town of Harristown; I could not be exact as to the amount of this tax; as nearly as I can state it was from \$75 to \$100; I do not recollect to whom I paid it; I could not give the name of the party to whom I paid it; I did not have charge of the work personally; don't know that a man by the name of Rorke worked for me then; one year Mr. Bishop, and two or three years Mr. O'Neil had charge; it seems that we had only a contract from Mr. Barnard on this quarter; my impression is that we had paid it up and taken title; I did have a contract; I have looked for it, but have been unable to find it.

Cross-examination:

I owned some land in the northwest quarter of township 24; I owned the whole quarter, less what was understood to be 1,000 acres formerly belonging to Peter Comstock; that left me 6,000 acres, or perhaps a fraction more; that is in the town of Harriettstown, and I owned it from 1864 to 1869.

Q. The money that you say you paid on the assumption that it was for road-work or road taxes in that town of Harriettstown at the time you speak of, may it have been for taxes in this quarter—the northwest quarter?

A. No; I think not.

Q. Do you know?

A. I do not; I supposed we had a deed to this quarter, but it appears now that we had not; it was sold to Norton; we assigned the contract, and he took title; if the record shows a deed from Barnard to me dated October 19, 1871, and a deed from me to Norton, dated January 17, 1873, I should say that it is correct, but it does not tally with my recollection; I did not see any of the apportionments by the highway commissioners of the road taxes for any of these years; I paid no attention to such matters; I do not know who I paid the money to, and I do not know the exact amount

73 paid; I do not know except from representation that that money was ever used for working road tax; I could not say whether I had any receipt from any pathmaster or highway commissioner for road taxes levied or apportioned to me during any of those years on any of the lands that I owned in the town of Harriettstown; all papers connected with that business have been destroyed; I do not know who was pathmaster during any of those years in any of the road districts where I was assessed; I have no recollection who I paid the money to; it may have been paid here in Plattsburgh, and very likely was; I have no recollection; I paid in money or its equivalent; I am able to say that I paid simply by the recollection that I have; I have no data; my account books covering those years have been destroyed; I have a distinct recol-

lection of paying some money, but at what time or in what amount I cannot say; the purpose I recollect distinctly; it was on lands in Harriettstown; those two portions were all that we had; some time before we owned about one-third of township 23, but not at this time; we had sold that to Rosecrans some years before; we owned it in 1859, but not long after; I do not know that Mr. Norton owned anything in the southeast quarter of township 24 until after our sale to him; I do not think that he did.

Redirect examination :

My books and papers were destroyed by fire about 1876.

Q. Were you requested by any one to work out the highway tax in Harriettstown in the years 1867 and 1868, and if so was it by the commissioner of highways?

Objected to, on the ground that the commissioner of highways had no right under the statute to inform the parties, but to deliver to the pathmaster the apportionment of taxes for each road district, and it is his duty, made so by the statute, to inform the parties assessed to pay.

Overruled and exception.

74 I was requested by Mr. Noakes; I subsequently paid it;

Mr. Noakes, I understood, was commissioner of highways, stated on what highway in Harriettstown he wanted this tax worked, on the road leading from Harriettstown, or the settlement at the river toward West Harriettstown, at a place near Priest Smith's, or near that neighborhood.

Recross-examination :

I have conversed on this subject recently with Messrs. Barnard, Beckwith and Turner; they did not tell me what certain witnesses had already sworn to in this case in regard to highway labor; they did not tell me the fact that highway work was done to work out the tax assessed upon some portions of this land that I owned; I claimed to own the whole southeast quarter of township 24 during those years from 1866 to 1869; I think about 7,500 acres; I do not know whether all my lands were in one road district or not; I do not know whether this particular place where I was requested to do work by the highway commission was in the road district in which my lands were assessed; I do not know the amount of the road tax for either of those years on all my lands; I do not know whether they were assessed uniformly by the acre or not; I do not know whether each quarter was assessed as a whole—I think it must have been—because they were not subdivided; I should presume the assessment would be in proportion to the number of acres allowed to that district.

Defendant rests.

FRANK C. PARKER, called on behalf of the plaintiff, testified :

I reside in Keene valley; I have been at what they call the Moody

meadows on the Rogers brook ; I was there about two years ago, when a photograph was taken of the meadow ; the picture
 75 shown me was then taken ; another was taken a few days ago ; I was there again a few days ago when the other picture was taken ; it was last Saturday ; there was snow on the ground then ; the picture was taken from a point on the division line, between the southeast quarter and the northeast quarter of township 24 ; it was a few rods from the county line ; it was the nearest point that a good view could be got ; the picture correctly represents the portion of the meadow which lies in the southeast quarter ; the trees in the corner, birch trees, have marks on them ; they are blazed on both sides of them ; on the east and west sides.

The plaintiff offers photograph in evidence.

Objected to by defendant as immaterial, insufficiently proved and incompetent for any purpose ; objection overruled ; photograph received ; exception to defendant.

Photograph marked " Plaintiff's No. 2."

Either party may use and produce the same upon the argument.

Cross-examination :

I was present when the photograph was taken ; I did look through the camera when the photograph was taken ; I did not see it developed.

Redirect :

I was with a surveyor once when he ran out the division line ; the surveyor was Charles F. Carpenter ; commenced to run out the line August 15, two years ago ; the division line crossed the brook, I should say, not more than twenty-five rods from the dam ; the dam is taken in this picture ; I mean you can see the place where it is ; the dam is so small you couldn't notice it any way in a picture ; this picture does not show all of the meadow which lies in the southeast quarter of township 24 ; it shows the entire large meadow ; there is a little strip of woods below the dam ; then
 76 there is a little strip of woods below that where the division line crosses ; I think there is not more than half an acre below the dam in the southeast corner of the township ; we took another picture showing that half acre ; picture shown me is the picture ; it correctly shows the delineation of the meadow below the dam ; it shows the line north of the division line ; where those stacks were stacked in the season is where the division line should cross between the north and south quarters ; and what lies on the upper side of that is the southeast quarter.

Plaintiff offers photograph in evidence.

Objected to by defendant as immaterial, insufficiently proved, and incompetent for any purpose.

Photograph received, marked " Plaintiff's No. 3."

Either party may use and produce the same upon the argument.

Exception to defendant.

I did not examine the extent of the meadows nor make any estimate of the acreage; I made some measurements; the total acreage of the meadows lying in the southeast quarter is a trifle over five acres; I include in that measurement everything that had been cut over at any time; I cannot tell how many acres north of the division line in the northeast quarter; I did not measure that; south of the division line there is this little strip of half an acre, and then beyond that about five acres; as I understand it the division line runs between the southeast and northeast quarter; there was a large meadow in the northeast quarter, and they were connected with the meadows here that have been mowed over; I should say about two-thirds of all the meadows lies south of the division line; all the mowing was to the south; I don't know positively about it; I was there in August; the character of the grass on these meadows was wild hay that you find generally on these wild meadows and marshes; I am familiar with the growth of wild grass in this region

77 on intervale lands; it does not differ at all from this; I did not see any evidence of any brush being cut; only some hemlock cut off for lumbering purposes outside the meadow; I saw no evidence at all of any cultivation; when we were there Mr. Moody was there cutting on the northeast quarter, not more than a few rods from the line; I examined the dam that was there; it was not much of anything; it was logs thrown across between two large rocks; a few stone rafts thrown down; nothing more than what a man could make in half a day very easily; there were two rocks, one on each side; the water ran between these two; on the upper side of these rocks the logs were placed, and the dam was not more than three feet high; the dam was at the top of the falls; I measured off fifty feet tape-measure; first I struck in on the shore on the edge of the brook; then we measured south through the dam; we made it about one hundred and twelve rods; the average width was eight rods, covering both sides of the brook; the soil is a kind of swampy bog soil; what is generally found in such places; it is cold, wet soil; I did not see that the brook had overflowed much; the ground did not appear to be springy; the turf was pretty thick.

Cross-examination:

I was requested to go to this place and make a survey by the warden, Mr. Garmon; I am one of his subemployees under the State forestry; have been so nearly three years; Albert Turner is in same employ; he was not with us when these pictures were taken, or when this survey was made; I went there for the commission; Garmon told me to do it, and I did; I used my own judgment somewhat; I knew what he wanted. I practiced surveying before I went into the employ of Garmon on a small scale; I do not pretend to be a surveyor; I am assistant sometimes in doing such things; before I went there by direction of Garmon I had been there to find the lines of the township—the outside lines; that was two years ago; a year ago last August was the time that I ran through
78 the lines the first time; Mr. Carpenter, our surveyor, told me where the corner was and where the line was; I did not

know when the township was originally surveyed or subdivided into quarters, nor who surveyed it originally ; never saw the original field-notes ; I had never been to the corner before ; I came to go to that corner when I was assisting a surveyor ; I do not know whether I was on the true division line or not, of my own knowledge, between the north and south half ; I did not conclude anything about it ; I was with my superior and went according to my instructions ; went through with him ; I do not know whether he was present at the time of the original survey ; I do not know whether he had the original field-notes ; from where the established corner is supposed to be, I can say what portion of this meadow lies on the north and what on the south side of the division line of the north and south half ; I believe Mr. Colvin established the corner ; Mr. Carpenter is dead ; I saw Mr. Moody there cutting grass on these meadows on the northeast quarter ; the hay on the southeast quarter had not been cut when I was there ; I never had any experience cutting brush in such places.

Redirect :

We found a spruce tree marked on three sides, and witness marks around it on this corner ; that is the county line ; besides, we found a rock which was marked with figures, and one thing and another for witness ; the rock was marked by an arrow and drill-hole pointing north and toward the corner ; going west across the brook we found a few marked trees right on the edge of the brook ; one was a balsam ; after that we came to a burned knoll and we struck through a marsh—Miller Pond marsh ; then we ran as far as we could and put up a flag and went round it ; at the other end we found the line again and retraced it to the edge of the marsh, where we found a blazed tree marked on a tamarack which was on the line which we ran ; it continued the line right through ; we ran north of the county line ; we followed the line trees a little way, and the rest was where the brush was cut ; this tree here on the photograph is on the county line ; the tree is at the head of the meadow ; the meadow that this picture represents is on the side of the line ; the spot shown on the photograph is the Essex County line ; those spots were on the stakes that we set and in the line that we run ; we run by the spot on the trees shown in the photograph ; the picture correctly represents the situation at the head of Exhibit No. 4, the meadow.

M. V. B. MILLER, called by the plaintiff :

I reside at Saranac Lake village, and have since 1859 ; I am acquainted with the southeast quarter of township 24, to some extent ; I have been over what is known as the Rogers Brook meadow or intervalles ; I lumbered it over once before there was any meadow there ; I had some shanties on that quarter right near where those meadows are in the winter of 1859 ; I lumbered this in 1859, 1860 and 1861 ; at that time there were no meadows there on that quarter ; there was some wild grass there, but nobody ever cut it ; I don't know anything about Mr. Moody doing anything there in 1859,

1860 or 1861; he didn't do any cultivating there above the falls; some of the Moodys had cut hay below; they had some stacks there; those stacks at that time were on the north of what is known as the division line, on the northeast quarter; the fields claimed to be meadows now were at that time low ground, and principally covered with tamarack—I cannot say whether dead or alive; I do not know how large a meadow might be made there north of the division line; there might be a meadow of twenty-five acres made south of the division line; I should have to guess at the number of acres north of the line; I do not think it would exceed four; I don't remember going there again until the spring of 1882; I then went on a survey with Mr. Colvin's party, and that is the first I knew of those meadows; there have been meadows there a good

80 many years; I did not go on the division line at that time; in 1882 there was some good meadows there; it might be four or five acres of meadows; I did not measure them; it was before they cut the hay; it was in June; I did not see any evidence of cultivation, only it showed that it had been mowed over some time or other; I did notice particularly as to the character of the grass; I know that in the vicinity of where the shanties were there was considerable of tame grass; I should think perhaps clover and timothy; I could not say how they came there; on the high ground the grass was of the character of wild grass; my impression is that it was better than the average quality of wild meadow hay; I have been over the division line since 1882; I went and put Mr. Carpenter on what we call the corner and went through the centre of the township; I knew where the corner was, because I had lumbered on it; I do not remember about the rock; the line crosses below the dam, probably twenty-five or thirty rods; in the upper portion of the meadow there were several clumps of alders in 1882; I am not sure that they had the appearance that they have in this picture; there was something in the brook to stop the water; some rafts across; at the time I — there it didn't stop the water; if they had been made tight it would have caused quite a little flow; I own a farm, and have a farm to take care of; I have seen redtop; there is no great room to make a mistake between redtop and June grass; June grass invariably grows on dry, light soil and ripens in June; redtop always grows on wet land; I do not think I ever saw any redtop grow unless something brought it there, in the way of cattle or of sowing or something of that kind; my experience is that if water stands on it for any length of time the redtop will get killed and wild grass come on; my shanties were built on the southeast quarter; I fed ordinary upland hay to my stock while there; I was there three winters, and manure was left on the ground; herdsgrass and clover sometimes take a little from feeding in that way.

81 Cross-examination:

The meadows were known at that early day and called the Moody meadows; I have known of their drawing mown hay in that direc-

tion; I was going through there once, and met Harvey Moody with a load of hay and got onto the load; he had drawn the load off those meadows; I got the impression that he had qu'ie a crop of hay, several tons altogether; I know the meadow up above had been extended at the time I was there with Colvin's party; Colvin did not pretend to run the division line; he had all the field-notes and I have got them now; the shanties were built right near the division line; and then we had a horse barn accommodating eight or ten teams extending north to the line; the line, as I recollect it, went within one rod of the horse barn; the shanties were burned in 1862; those shanties were ninety feet long perhaps; there was a general fire all through them in 1862, and whether it originated by somebody in the camp or some other way I do not know; the ride I had with Mr. Moody was probably five or ten years before he died; I was agent under the comptroller for a while.

Q. After the sale of 1881, and in the year 1881, did you report to the comptroller of the State of New York that the southeast quarter of township 24 was occupied, and were you at that time in the employ of the comptroller to look after State lands and their occupancy in this region?

Objected to as immaterial, irrelevant, and incompetent, and improper; objection sustained; exception to defendant.

(Witness shown copy of assessment-roll of the town of Harriettstown of 1870, and purporting to have the warrant of the supervisors thereto.) Witness says, he was supervisor of that town for that year; says he knows the signatures of the supervisors of that year; seen them sign in that way and became acquainted with their signatures.

82 Defendant offers to show that the signatures to the warrant attached to the assessment-roll are the genuine signatures of the supervisors of the town of Harriettstown for the year 1870.

Objected to by the plaintiff as improper and irrelevant; that the roll presented to the witness purports to be only a copy, and that no signature is necessary to be attached to it; that the warrant is no part of a copy of any assessment-roll; objection sustained; exception to defendant.

Redirect examination:

In the roll of 1870 in evidence there is no signature to the assessment-roll of the assessors or of any magistrate.

Plaintiff rests.

The testimony was here closed.

The plaintiff at the close of the trial moved to strike out the assessment-rolls of the town of Harriettstown, Exhibits C, D, E, and F, as immaterial and irrelevant, under chapter 448 of the Laws of 1885. Defendant opposed the motion on the ground that said act was unconstitutional and void, and in violation of section one of article fourteen of the amendments to the Constitution of the United States.

Motion granted and rolls stricken out; exception to defendant.

The foregoing case contains all the evidence offered on the trial of the action.

The defendant at the time the cause was submitted to the referee requested the referee to make the following findings of fact and conclusions of law, which requests were disposed of by the referee at the time he made his report in the manner expressed under each of said requests respectively :

83

Facts.

First. The southeast quarter of township 24, great lot one, Maccomb's purchase, situated in the town of Harriettstown, Franklin county, New York, being the premises mentioned in the complaint herein, was sold for unpaid taxes in the year 1859 by the comptroller of the State of New York to Samuel W. Barnard, and conveyed to him by the said comptroller in pursuance of such sale by deed dated December 27, 1864.

I so find.

RICHARD L. HAND, *Referee.*

Second. At the time of the sale mentioned in the preceding request said Samuel W. Barnard, together with one F. J. Barnard had, or claimed to have, title to the said lands or to an undivided interest therein ; which interest, together with the estate and interest in said land acquired by said Samuel W. Barnard under the comptroller's deed mentioned in the preceding request, was conveyed to Christopher F. Norton by said Samuel W. and F. J. Barnard by deed dated November 25, 1872, and recorded in Franklin county clerk's office in Book 51 of Deeds, page 486, on the 22d day of January, 1873.

I so find.

RICHARD L. HAND, *Referee.*

Third. The said lands mentioned in the first request were again sold for unpaid taxes in the year 1866 by the comptroller of the State of New York, and thereafter and in pursuance of the said sale were conveyed by the said comptroller to the said Christopher F. Norton by deed dated January 22, 1873, and recorded in Franklin county clerk's office in Book 57 of Deeds, page 577, on the 25th day of February, 1873.

I so find.

RICHARD L. HAND, *Referee.*

Fourth. The land in question is in general wild and uncultivated forest land, but in the northeast part thereof there is, and at all times since about 1860 there has been, a parcel containing about
84 ten acres lying on each side of " Rogers brook," so called, and extending into the northeast quarter of said township, but at least five acres thereof being in the said southeast quarter, which is, and since about 1860 has been, substantially cleared, upon which grass capable of being made into hay, naturally and annu-

ally grows, and which is, and since about 1860 has been known as the "Moody" meadow.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Fifth. Harvey Moody in the summer of each year from about 1860 down to his death in 1880 cut, or caused to be cut, the grass growing on the said meadow, made it into hay and stored it in stacks upon the said meadow until the following winter when he drew or caused it to be drawn to his home about six miles distant, where he used it for the purpose of feeding cattle as hay is ordinarily used, or sold it to others for such use. The quantity of hay so cut and made upon the land in question by said Harvey Moody varied, amounting in some years to from eight to twelve tons.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Sixth. Harvey Moody upon different occasions between 1860 and 1880 caused grass seed to be sown upon the said meadow.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Seventh. Harvey Moody upon different occasions between 1860 and 1880 caused the said meadow to be burned over, the object being to remove the stubble and brush and to fertilize the ground and so increase the quantity of hay to be obtained therefrom.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

85 Eighth. Harvey Moody upon different occasions between 1860 and 1880 cut, or caused to be cut, and removed alders and other brush growing in or around the said meadow, thereby increasing the area of grass-growing land, and some years previous to his death erected and afterward maintained a dam across the Rogers brook upon the said meadow, for the purpose of flooding the said meadow.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Ninth. At some time between the year 1870 and 1876, and when Christopher F. Norton owned or claimed to own the said southeast quarter of township No. 24, an agreement was made between said Norton and Harvey Moody whereby said Norton in consideration of work and labor to be performed by said Moody in guarding from trespassers the lands owned or claimed by said Norton, granted to said Moody the right to use the meadow land described in the fourth of these requests and agreed to give him a written lease of the same.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Tenth. It was the intention of Harvey Moody in making the agreement with Christopher F. Norton mentioned in the last preceding request, to secure to himself the beneficial enjoyment of the parcel of land called the "Moody meadow," so far at least as such enjoyment consisted in the appropriation of the ordinary and annual product of said land in its natural condition; and the said Moody then claimed to said Norton that such beneficial enjoyment ought to be granted to him rather than to a stranger for the reason that he had performed work and labor upon the said meadow in cutting brush and otherwise bringing it to its then condition.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

86 Eleventh. The acts of Harvey Moody in cutting and making hay upon the so-called "Moody meadow," as stated in the fifth of these requests to find, were open and visible, and the same were generally known throughout the vicinity in which he lived.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Twelfth. No person except said Harvey Moody cut grass or took hay from the said meadow from the year 1862 down to the death of said Moody in 1880.

I so find.

RICHARD L. HAND, *Referee*.

Thirteenth. Hay grown and made upon natural meadows in the same manner in which hay was made upon the land in question by Harvey Moody was valuable and was an article of merchandise in that region during the years from 1860 to 1880, and on different occasions hay made by said Moody from the lands in question was sold by him.

Refused, except as found in my report.

RICHARD L. HAND, *Referee*.

Fourteenth. In the summer of 1879 Harvey Moody cut or caused to be cut the grass upon the said meadow and made the same into hay and stored the same in stacks upon the said land. The quantity of hay so made was about twelve (12) tons. It remained upon the land where made until January or February, 1880, when said Harvey Moody caused it to be drawn to his home.

I so find.

RICHARD L. HAND, *Referee*.

Fifteenth. The use made by Harvey Moody of that parcel of land know as the "Moody meadow," as such use is stated in the 5th, 6th, 7th, 8th, 13th and 14th of the foregoing requests, was in accordance with the common practice then prevailing in that section of country as regards the use and occupation of lands similar in nature,
87 character, situation and environment to the said meadow.

Refused.

RICHARD L. HAND, *Referee*.

Sixteenth. On or about April 15, 1880, Harvey Moody executed and delivered to his daughter Polly Philbrook and his son Fayette Moody a deed purporting to convey that parcel of land forming part of the southeast quarter of said township 24 referred to in the fourth request as the "Moody meadow."

I so find.

RICHARD L. HAND, *Referee*.

Seventeenth. Harvey Moody, on October 12, 1879, had possession of the southeast quarter of township 24, great lot one, Macomb's purchase, or some part thereof.

Refused.

RICHARD L. HAND, *Referee*.

Eighteenth. On the 12th day of October, 1879, the southeast quarter of township 24, great lot one, Macomb's purchase, or some part thereof, was actually occupied by Harvey Moody.

Refused.

RICHARD L. HAND, *Referee*.

Nineteenth. From April 15, 1880, that being the date of the conveyance mentioned in the sixteenth request, down to at least the 23d day of November, 1883, that parcel of land known as the "Moody meadow," and being part of the lands in question, was actually occupied by Polly Philbrook and Fayette Moody, under color of title.

Refused.

RICHARD L. HAND, *Referee*.

Twentieth. On the 12th day of October, in the year 1877, the southeast quarter of township twenty-four (24), great lot one (1), Macomb's purchase, was sold by the comptroller of the State of New York for unpaid taxes.

SS The taxes for which the said sale was made were the county and highway taxes for each of the years 1866, 1867, 1868, 1869 and 1870, and the school taxes for 1869.

At the said sale, the said land was bid — by the said comptroller on behalf of the people of this State, and thereafter was conveyed to the said comptroller to the people of this State by deed, dated June 9, 1881, which deed was recorded in the office of the clerk of Franklin county on June 8, 1882.

The two years allowed by law within which the said land might be redeemed from the said sale, expired on October 12, 1879.

I so find.

RICHARD L. HAND, *Referee*.

Twenty-first. The title, if any, acquired by the plaintiff herein to the lands in question, under and by virtue of the comptroller's deed, mentioned in the last preceding request, is the only title to said lands shown or claimed by the plaintiff on the trial of this action.

I so find.

RICHARD L. HAND, *Referee*.

Twenty-second. No proof has been made in this action that the plaintiff, as purchaser at the tax sale of 1877 or otherwise, ever

served or caused to be served upon the person or persons occupying the lands in question or any part thereof, during the two years allowed by law to redeem from the said sale the notice required by section 68, chapter 427 of the Laws of 1855.

Found as in report, finding VIII; otherwise refused.

RICHARD L. HAND, *Referee*.

Twenty-third. The assessors in and for the town of Harriettstown Franklin county, N. Y., who acted as such in preparing the assessment-roll for the year 1867 were Augustus Torrence and J. J. Miller; the said assessors prepared the assessment-roll of the said town for said year, and the oath required by law as to the correctness of said roll was made and subscribed by them on the 10th day of August, 1867, and the said oath was never thereafter again made by the said assessors.

Refused; plaintiff's deed is conclusive evidence to the contrary.

RICHARD L. HAND, *Referee*.

Twenty-fourth. The assessment-roll of the town of Harriettstown for 1867 prepared and verified in the manner stated in the last preceding request contained upon it the southeast quarter of township 24, great lot one of Macomb's purchase, and was the assessment-roll upon which the supervisors of Franklin county at their annual meeting in 1867 acted in levying the tax upon the said land for the year 1867, which tax was included among those for default in payment of which the said lands were sold by the comptroller on October 12, 1877, as stated in the twentieth of these requests to find.

Refused; same as twenty-third.

RICHARD L. HAND, *Referee*.

Twenty-fifth. In the year 1870 the assessors of the town of Harriettstown after having prepared their assessment-roll for that year, did not nor did any two of them meet on the third Tuesday of August or on any day thereafter for the purpose of reviewing their assessments for that year, and it was upon the assessment-roll so prepared by said assessors and not reviewed by them that the supervisors of Franklin county acted in levying the tax upon the land in question in the year 1870 for default in payment of which the said land was sold by the comptroller on October 12, 1877, as stated in the twentieth of these requests to find.

I refuse to so find; plaintiff's deed is conclusive evidence to the contrary.

RICHARD L. HAND, *Referee*.

Twenty-sixth. Christopher F. Norton died intestate in or about 1882, leaving a widow and eight children him surviving, his only heirs-at-law.

On December 16, 1886, six of the children and heirs-at-law of said Christopher F. Norton conveyed all their estate, right, title and interest in and to the southeast quarter of township 24, great lot one, Macomb's purchase, to John B. Riley and on

December 27, 1886, said John B. Riley conveyed all his estate, right, title and interest in and to said land to the defendant herein.

I so find.

RICHARD L. HAND, *Referee*.

Twenty-seventh. On June 20, 1877, a judgment was rendered against Christopher F. Norton by the supreme court in an action then pending therein wherein John D. Spicer and John E. Spicer were plaintiffs, and said Norton was defendant, for \$59,178.28, and the roll thereof then duly filed and the said judgment docketed in the office of the clerk of Rensselaer county. A transcript of said judgment was duly docketed in the office of the clerk of the county of Franklin on June 21, 1877. After the death of said Christopher F. Norton such proceedings were had, that in April, 1887, an order was duly made by the supreme court, and also a decree by the surrogate's court of Clinton county, that being the surrogate's court having jurisdiction in the premises, granting to William E. Smith as the assignee of the said judgment, leave to issue execution thereon to be enforced against any lands upon which said judgment was a lien in the same manner as if said Norton were not dead. In pursuance of said order and decree and on April 28, 1887, execution was duly issued upon said judgment to the sheriff of Franklin county, under which execution the said sheriff on June 18, 1887, sold to the defendant herein for the sum of six thousand dollars all the estate, right, title and interest which Christopher F. Norton had in and to the southeast quarter of township 24, great lot one, Macomb's purchase, on the 21st day of June, 1877, or which he thereafter required, and on the 19th day of February, 1889, said sheriff duly executed and delivered to the defendant a deed of conveyance of the lands so sold to him.

I so find.

RICHARD L. HAND, *Referee*.

91 Twenty-eighth. This action was begun March 28, 1887.

Refused.

RICHARD L. HAND, *Referee*.

Twenty-ninth. At the time this action was begun defendant was in the actual possession of the lands in question claiming to own the same as his property.

Refused.

RICHARD L. HAND, *Referee*.

Thirtieth. Neither the people of the State of New York, nor any officer of said State on their behalf, ever took actual possession of the lands in question under or subsequent to the conveyance to them, made by the comptroller June 9, 1881, in pursuance of the sale of 1877; nor was the said people or any officer of the State in the actual possession of said lands when this action was brought.

I so find.

RICHARD L. HAND, *Referee*.

Thirty-first. If the referee shall refuse the thirtieth request, then: No proof has been offered showing, or tending to show, that the people of the State of New York, or any officer of the State on their

behalf, ever took actual possession of the lands in question under or subsequent to the comptroller's deed to them of June 9, 1881.

I so find.

RICHARD L. HAND, *Referee*.

Law.

First. That Christopher F. Norton was the owner in fee-simple of the southeast quarter of township 24, great lot one, Macomb's purchase, at the time the same was sold for taxes by the comptroller in 1877, as stated in the 20th proposed finding of fact, and had actual or constructive possession of the same.

I so find.

RICHARD L. HAND, *Referee*.

92 Second. That Harvey Moody under and by virtue of his agreement with Norton, mentioned and set forth in the 9th proposed finding of fact, and his acts thereunder, acquired an interest in that parcel of land called the Moody meadow which amounted to an estate in the land.

Refused.

RICHARD L. HAND, *Referee*.

Third. That Harvey Moody by the various acts of ownership done by him upon and with reference to that parcel of land called the "Moody meadow," as specified and set forth in the 5th, 6th, 7th, 8th, 9th, 12th, 13th, 14th and 16th proposed findings of fact, acquired and took actual possession of the said parcel of land.

Refused.

RICHARD L. HAND, *Referee*.

Fourth. That on October 12, 1879, that being the time, when the two years allowed by law for the redemption of lands sold by the comptroller for unpaid taxes in 1877 expired, the southeast quarter of township 24, great lot one, Macomb's purchase, or some part thereof, was in the actual occupancy of Harvey Moody.

Refused.

RICHARD L. HAND, *Referee*.

Fifth. No title whatever to the lands in question vested in the people of the State of New York under or by virtue of the sale to them made by the comptroller October 12, 1877, or the subsequent deed to them executed by the comptroller in pursuance of said sale, unless the said people caused a written notice, in the form and containing the statements required by section 68 of chapter 427 of Laws of 1855, to be served upon the person or persons occupying the said lands or some part thereof as stated in the 18th and 19th requested findings of fact, within two years from the 12th day of October, 1879.

Refused.

RICHARD L. HAND, *Referee*.

93 Sixth. It is incumbent on the plaintiffs in order to establish title in themselves to the lands in question under the tax sale of 1877, to prove affirmatively that they have served

the notice specified in the last preceding request upon the person or persons occupying the lands in question or any part thereof.

Refused, because not occupied. RICHARD L. HAND, *Referee*.

Seventh. Plaintiffs, by reason of their failure to prove service of notice on the occupant of the lands in question, have for that reason failed to show any title in themselves to the said lands.

Refused. RICHARD L. HAND, *Referee*.

Eighth. The taxes levied and imposed upon the lands in question by the supervisors of Franklin county in the year 1867, being based, as stated in the 23d and 24th requested findings of fact, upon an assessment-roll verified by the assessors of the town in which said lands were situated before the third Tuesday in August, in the year for which they were assessed, were for that reason illegal and void.

Refused. RICHARD L. HAND, *Referee*.

Ninth. The taxes levied and imposed by the supervisors of Franklin county upon the lands in question in the year 1867, being based, as stated in the 23d and 24th requested findings of fact, upon an assessment-roll verified by the assessors of the town in which they were situated, before the third Tuesday of August in the year for which they were assessed, were for that reason illegal and void under the laws of this State, as they existed and were interpreted, construed and applied by the courts of this State, both at the time the said taxes were levied and at the time the land in question was sold by the comptroller in 1877 for their non-payment.

I decline to so find. RICHARD L. HAND, *Referee*.

Tenth. The taxes levied and imposed upon the lands in question by the supervisors of Franklin county in the year 1870 were illegal and void by reason of the omission of the assessors to meet to review their assessments, as stated in the 25th proposed finding of fact.

Refused. RICHARD L. HAND, *Referee*.

Eleventh. The taxes levied and imposed upon the lands in question by the supervisors of Franklin county in the year 1870, by reason of the omission of the assessors to meet to review their assessment-roll, as stated in the 25th proposed finding of fact, were illegal and void under the laws of this State, as such laws existed and were interpreted, construed and applied by the courts of this State, both at the time said taxes were levied and at the time the land in question was sold by the comptroller in 1877 for their non-payment.

I refuse to so find. RICHARD L. HAND, *Referee*.

Twelfth. The sale of the lands in question made by the comptroller to the plaintiff October 12, 1877, was and is illegal and void, and the conveyance of the said land executed by the comptroller to

the plaintiff in pursuance of said sale, was and is ineffectual to divest the owner of said lands of his title.

Refused.

RICHARD L. HAND, *Referee*.

Thirteenth. The sale of the lands in question made to the plaintiff by the comptroller, October 12, 1877, was illegal and void under the laws of the State of New York as they existed and were interpreted, construed and applied by the courts of this State at the time of said sale; and the conveyance of said lands executed to the plaintiff by the said comptroller in pursuance of said sale was, under the laws of this State as they then were, invalid and ineffectual to divest the owner of said lands of his title.

I refuse to so find.

RICHARD L. HAND, *Referee*.

95 Fourteenth. Chapter 448, of the Laws of 1885, so far as the same attempts, or undertakes, or purports, to render valid and effectual any past sale of lands for unpaid taxes, which sale, at the time it was made, was for any reason illegal and void, is invalid for the reason that the same is repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Refused.

RICHARD L. HAND, *Referee*.

Fifteenth. During the six months immediately following the 9th day of June, 1885, that being the day on which chapter 448 of the Laws of 1885 was passed, there was no law or statute of the State of New York in force whereby the people of said State had subjected themselves to any action at law or suit in equity or to any other legal proceeding in a court of justice for the purpose of vacating any sale of lands to the said people for unpaid taxes, or any conveyance or certificate of sale made to the said people in pursuance of such tax sale.

Refused.

RICHARD L. HAND, *Referee*.

Sixteenth. The power and authority conferred by the laws of the State of New York upon the comptroller of said State to cancel sales of land for unpaid taxes whenever such sale shall, for any cause, be invalid, as such power and authority existed during the six months following the 9th day of June, 1885, according to the interpretation and construction given to the laws of said State conferring such power, by the highest court in said State, cannot be invoked by the person whose land was sold for taxes, nor can the said comptroller be compelled, upon the application of such person to cancel an invalid tax sale.

Refused.

RICHARD L. HAND, *Referee*.

96 Seventeenth. Chapter 448 of the Laws of 1885, considered as a statute of limitation and with reference to sales of land for unpaid taxes made prior to its passage to the people of the State of New York, which sales were for any reason illegal

and void when they were made, is invalid and repugnant to the Constitution of the United States and particularly to the first section of the fourteenth article of the amendments thereof.

Refused.

RICHARD L. HAND, *Referee*.

The foregoing case is hereby settled and allowed, and I hereby certify that the same contains all the evidence given upon the trial of this action, and the clerk of Franklin county is hereby ordered to file the same in his office and attach it to the judgment-roll.

Dated, April —, 1894.

RICHARD L. HAND, *Referee*.

It is hereby stipulated that the foregoing are correct and true copies of the judgment-roll, exceptions, notice of appeal, and case constituting the entire record in this action, all of which are on file in the office of the clerk of Franklin county, and certification of the same by the said clerk is hereby waived.

Dated, April —, 1894.

ALBERT HESSBERG,
Attorney for Plaintiff.
FRANK E. SMITH,
Attorney for Defendant.

97

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK }
vs. } Opinion.
BENTON TURNER.

HAND, *Referee*:

The objections that the assessment-roll for 1867 was not verified after the tenth day of August, and that the assessors did not meet in 1870 for review of their assessment, are obviated by chapter 448 of the Laws of 1885. Indeed, the effect of this enactment being to make the conveyance, under which the plaintiff claims conclusive evidence, under the circumstances of this trial, of regularity in these respects, it cannot be found that such objections have any basis of fact. Nor is this statute unconstitutional in that regard.

People vs. Turner, 49 Hun, 466.

S. C. in Ct. of Appeals, 117 N. Y., 227.

Joslyn vs. Rockwell, 13 N. Y. Suppl., 311.

Cromwell vs. McLean, 123 N. Y., 474.

It is urged with great force that the decisions by which the constitutionality of this enactment was maintained were in cases where the objection of want of opportunity, because the State, who claims under the comptroller's deed here, has not expressed its consent to be sued, was not presented to or considered by the courts. But the same state of facts in this respect existed in *People vs. Turner* (117 N. Y., *supra*), and no impression produced upon the mind of the referee by the learning and ability of the learned counsel for the

defendant could properly result in a decision that a statute is unconstitutional, which the courts of this State have upon facts substantially the same declared constitutional, upon the theory

98 that those courts have overlooked the existence or effect of those facts. Such an argument, if correct, cannot prevail until presented in the court of appeals.

If the premises described in the comptroller's deed to the plaintiff and under which the plaintiff claims in this action, "or any part thereof" were, on the 12th day of October, 1879, "in the actual occupancy of any person," the plaintiff has failed to establish title; has not shown a right to the immediate possession of the logs cut by the defendant, and cannot, therefore, recover in this action.

No claim was made that there was any occupation otherwise than by the acts of Harvey Moody; and the question presented is, whether those were an actual occupation of any part of the premises at the time specified.

It must be conceded, we think, that this question should be considered and determined precisely as if the only property described in the comptroller's deed to the plaintiff were the strip of land along Rogers brook, spoken of as "Moody's meadows."

Comstock *vs.* Beardsley, 15 Wend., 348.

Bush *vs.* Davidson, 16 Wend., 550.

Leland *vs.* Bennett, 5 Hill, 286.

The authorities were also to the effect that the occupation within the meaning of this statute (Laws of 1855, ch. 427, sec. 68) need not be under claim of title.

Jackson *vs.* Estey, 7 Wend., 148.

Lucas *vs.* McEnerna, 19 Hun, 14.

Bank *vs.* Mercereau, 3 Barb., ch. 528.

The facts may be stated briefly as follows:

In the midst of a forest, three miles from any highway or human habitation, was a piece of low marshy land, too soft to bear upon its surface the weight of domestic animals, excepting when frozen in the winter season, through which ran a small stream, called "Rogers brook." The melting snows covered this strip of land with water in the spring time, and a scant natural growth of trees grew and died and fell upon it. "Wild grass" occupied much of

99 its surface and frequent "clumps" of alder and other bushes were scattered over it. Its condition seems to have been attributed to the work of a colony of beavers, at some previous time, as it is characterized as a "beaver meadow." Such a place, resulting from purely natural causes, would furnish a kind of coarse hay, available for feeding cattle but unsuited to horses. It is not proved, but may, we think, be inferred from the testimony of Torrance, Ames and Miller, that such natural meadows are not uncommon among Adirondack forests and that the people of that country resort to them, more or less, for the grass which may be obtained from them.

The land in question lay in the southeast and northeast quarters

of township 24 (the southeast quarter being the premises described in the complaint) and extended across the township line into the adjoining county of Essex; four or five acres of it lying in each quarter, and about one acre beyond the county line.

About the year 1860, Harvey Moody, residing some six miles distant and having no right to or interest in the premises, entered upon this natural meadow and cut some grass, but seems to have done nothing upon that portion of it lying in the southeast quarter of the township earlier than 1862 (Miller). About the year 1862, or soon after, he extended this cutting into the southeast quarter and over into Essex county. From that time and until his death, in April, 1880, he annually, in August or September, cut this grass; and as it could not be drawn away until the ground was frozen, stacked it on the ground when cut. Each succeeding winter, in January or February, it was drawn off by himself and those to whom he at times sold some of it. The amount of hay thus procured from the entire surface cut over varied, the largest amount being from eight to twelve tons.

On two occasions Moody scattered a little grass seed on the surface, once a peck of "herdsglass," and on the other occasion a peck of "redtop," and he twice burned over the dry brush and stubble. From time to time he cut away more or less of the bushes, by which the area of the grass was somewhat enlarged. Such cutting 100 on the one hand, and the natural increase of bushes on the other, made the extent of surface which could be mown quite variable, but it seems to have never exceeded ten acres.

He used a small "dam," made by throwing some poles across the brook and placing slabs or pieces of board on them, to obstruct the stream and thus overflow a little land—perhaps half an acre.

The quality of grass improved somewhat and was slightly superior to that cut upon similar natural meadows in that portion of the country.

No other person, so far as appears, ever cut grass upon this ground, and it came to be known as the "Moody meadows."

Between 1870 and 1876, Mr. Norton, who was the owner of the southeast quarter of township 24, and other forest lands in the neighborhood, visited his property. Moody had an interview with him at that time, and an agreement was made between them by which, in consideration of Moody's undertaking to keep watch for trespassers on Norton's property, the latter gave Moody the privilege of cutting grass upon these "Moody meadows." There was some talk about a lease of them and such a paper was subsequently written, but it does not appear to have been delivered to Moody, or indeed executed by Norton. No dwelling-house or other building was ever placed or used upon the land by Moody. No fence inclosed any part of it at any time. No ground was broken anywhere upon its surface. Nor is it shown that its use had any connection with any known farm, or was for supply of fuel or fencing timber.

These being the facts, was Moody "in the actual occupancy" of the premises in October, 1879?

It is not necessary to the possession of land, we think, that it be inclosed by fence, or that any one should in fact reside upon it; but we are aware of no adjudication by the courts of this State which recognized as an "actual occupant," under this statute, one who does

not either reside upon or cultivate uninclosed premises. In 101 *Comstock vs. Beardsley*, there was a resident in a dwelling-house and cultivation also; in *Bush vs. Davison*, a tenant reside upon the land; in *Leland vs. Bennett*, there was an actual cultivation, and the decision of *Smith vs. Sanger*, in the supreme court (3 Barb., 360), was based upon cultivation and the fact that a fence inclosed the premises.

It is urged, however, that here is shown cultivation, because Moody scattered some grass seed on the surface, twice, set fire to the dry materials on the surface, twice, on different occasions obstructed the brook in such a way as to put half an acre of the land temporarily under water, and cut away some of the alders nearly every year.

We cannot regard all these acts as constituting in any proper sense cultivation. These, it seems to us, are but incidents, and very slight ones, in the getting from wild, uninclosed and unimproved land its natural product. While the photographs in evidence, and, more especially, the description given by all the witnesses render the claim that this "beaver meadow" was cultivated or improved entirely indefensible.

But if this could be regarded as a cultivation of the meadow, an insuperable difficulty is found, we think, in the relations of Moody to the property. It would seem an embarrassing rule, by which the intent of a third person in doing acts upon the land should be of weight in determining where the title to that land is vested. Yet there can be no question that such intent may be of the utmost importance. Suppose a piece of property has been sold for taxes, upon which there is an abandoned dwelling-house, the premises being wholly unoccupied. When the time for giving notice to occupants has arrived, should the purchaser find in this dwelling-house a tramp, who has availed himself of its shelter for an hour's midday slumber, must his title fail for want of notice to redeem given to this tramp? On the other hand, if this same tramp, with

the intention to adopt this house as his dwelling and hold it 102 as such, right or wrong, so long as he can, has entered into possession of it, can it be said that there is no "actual occupant" of it?

We think that the court of appeals has directly decided that intent may be a vital element of "actual occupancy."

Smith vs. Sanger, 4 N. Y., 577.

There was what the supreme court regarded as a substantial inclosure of a very small part of lot 84 by one occupying and cultivating the adjoining lot 4. The case then presented the facts, visible upon the ground, of inclosure and cultivation. Upon these facts the supreme court decided that title to lot 84 by comptroller's deed upon tax sale was not good, because there had been no notice to

redeem. This decision was reversed by the court of last record, and the theory of such reversal was expressed by Brownson, J., in these words: "In all of the cases where it has been held that notice was necessary, there was a substantial occupancy of some part of the lot or parcel of land, with an intention to enjoy the property, either by right or by wrong; while here the enjoyment seems to have been merely accidental, and without an intention to occupy any part of lot 84."

We cannot resist the conclusion that nothing done by Moody constituted "actual occupation" of these "meadows." Until his arrangement with the owner, he was a naked and confessed trespasser. The annual repetition of the trespass did not make it more than a trespass. He came to the owner with that confession and pretending nothing more. It is not improbable that very many "natural meadows" exist among the Adirondack forests which are, and for many years have been, annually mowed and the grass taken away precisely as this had been, but it cannot be that this constitutes actual occupation of them. If it were so, the assessment of all such lands as non-resident would seem to be void, and all the sales of them for non-payment of taxes inoperative, beyond the curative effect of any exercise of legislative power.

Joslyn *vs.* Rockwell, *supra*.

103 After the arrangement with the owner, and in October, 1879, he was exercising a privilege—enjoying a definite license to do a specific thing—which was, to cut and carry away grass from this piece of land. There was in our opinion no holding of the land, no possession of the premises as such—nothing more than the enjoyment of a license to do some one thing upon the premises. This too was enjoyed not by him as agent of the owner or for the benefit of the owner, but for his own personal advantage.

The conclusion reached seems to us fully supported by the analogy of numerous decisions of our courts in actions of a different class.

For example, the action to quiet title lies only when the plaintiff has been for three years "in the actual possession" (Code, sec. 1638), and the action of ejectment must be brought against the occupancy, if the premises are "actually occupied" (Code, sec. 1502), and may be maintained, in the absence of paper title, by proof of the plaintiff's actual possession unlawfully entered upon by defendant.

Illustrations of what constitutes "actual possession" or "actual occupation" in such cases, are given by the following adjudications:

In actions to quiet title—

Cleveland *vs.* Crawford, 7 Hun, 616.

Churchill *vs.* Onderdonk, 59 N. Y., 134.

See also the Massachusetts case of—

Jeffrey's Neck *vs.* Ipswich, 26 N. E. Rep., 239.

And the Vermont case of—

Town of Corinth *vs.* Locke, 20 Atl. Rep., 809.

In ejectment—

- Shaver *vs.* McGraw, 12 Wend., 558.
 Lane *vs.* Gould, 10 Barb., 254.
 Redfield *vs.* Utica, etc., R. R., 25 Barb., 54.
 104 Miller *vs.* Downing, 54 N. Y., 631.
 Thompson *vs.* Burhans, 79 N. Y., 93.
 Martin *vs.* Rector, 101 N. Y., 77.
 Gouverneur *vs.* Nat'l Ice Co., 11 N. Y. Supp., 87.

So too in cases of trespass and the like—

- Wheeler *vs.* Spinola, 54 N. Y., 377.
 Miller *vs.* Long Island R. R., 71 N. Y., 380.
 Price *vs.* Brown, 101 N. Y., 669.
 Roe *vs.* Strong, 107 N. Y., 350.
 Lyon *vs.* Sellew, 34 Hun, 124.
 Pierce *vs.* Keator, 9 Hun, 532; *affd.* 70 N. Y., 419.

The tendency of all the authority in this State, so far as we have been able to discover it, would seem to be, that to constitute actual occupancy of land, there must be either residence, use of buildings for business, manufacturing, etc., inclosure, cultivation, or use of the land in connection with some known farm, or for the supply of fuel and fencing timber for ordinary use, and also an intention to possess and enjoy the land, either by right or by wrong, as distinguished from enjoyment of a license to do some act upon the land or profit *a prendre*.

We have been referred to numerous cases decided in other jurisdictions, which we have carefully considered, with many others not cited by counsel. These are not in harmony, and we need not speculate as to the weight of conflicting precedents from other States to determine on which side of the question the balance descends, having such abundance of authority of our own jurisdiction.

Having given much time and labor to this question, with the aid of able and scholarly arguments by the learned counsel on each side and the careful examination of a very large number of adjudications, we have reached the conviction that the plaintiff was not under the necessity of showing service of any notice to redeem, because there was no "actual occupancy" of any part of the premises conveyed to the State by the comptroller.

105 At a general term of the supreme court, held in and for the third judicial department of the State of New York, at the city hall, in the city of Albany, on the 8th day of May, 1894.

Present: Hon. Stephen L. Mayham, presiding justice; Hon. D. Cady Herrick, Hon. John R. Putnam, associate justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
against
 BENTON TURNER, Appellant. }

The above-entitled action having been duly reached in its regular order on the calendar:

Now, on motion of Albert Hessberg, of counsel for the plaintiff,

respondent, and after hearing Thomas F. Conway, Esq., of counsel for the defendant, appellant; it is—

Ordered, that the judgment so as aforesaid appealed from be and the same hereby is in all things affirmed, with costs to plaintiff, respondent.

Filed & entered in Franklin county May 18, 1894.

JAS. D. WALSH, *Clerk*.

106

Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK

against

BENTON TURNER.

} Judgment. May 18, 1894.

The appeal from the judgment in the above-entitled action having been duly reached in its regular order on the calendar, at a general term of the supreme court, held in and for the third judicial department, at the city hall, in the city of Albany, on the 8th day of May, 1894, and said judgment having been affirmed by the order of said court, duly entered:

Now, on motion of Albert Hessberg, of counsel for the plaintiff it is—

Adjudged, that the judgment so as aforesaid appealed from be and the same hereby is in all things affirmed.

It is further adjudged, that The People of the State of New York, the plaintiff, respondent, recover of Benton Turner, the defendant, appellant, the sum of seventy-two dollars and four cents (\$72.04) as costs and disbursements on said appeal.

Filed & entered in Franklin county May 18, 1894.

F. S. CHANNELL, *Clerk*.

107

New York Supreme Court, Franklin Court.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
against
BENTON TURNER, Appellant. }

SIRS: You will please take notice that the defendant, Benton Turner, hereby appeals to the court of appeals from the judgment of the general term of the supreme court in the above-entitled action, entered in the office of the clerk of Franklin county on May 18, 1894, affirming with \$72.04 costs the judgment rendered in this action in favor of plaintiff and against defendant for two thousand one hundred and ninety-eight dollars and sixty cents (\$2,198.60), and entered in Franklin county clerk's office, June 6, 1891.

Dated May 24, 1894.

Yours, &c.,

FRANK E. SMITH,

Attorney for Appellant, Plattsburgh, N. Y.

To Hon. Albert Hessberg, attorney for respondent, Albany, N. Y.;
F. S. Channel, Esq., Franklin county clerk.

Indorsed: Filed June 1, 1894.

108 STATE OF NEW YORK, }
County of Franklin. }

I, Frank S. Channel, clerk of Franklin county, do hereby certify that I have compared the foregoing notice of appeal to the court of appeals and judgment-roll on the affirmance by the general term of the judgment in the action of The People of the State of New York against Benton Turner with the original thereof now on file and of record in my office, and that the same are true copies of said originals respectively and of the whole thereof.

In witness whereof, I have hereunto set my hand and official seal this 11 day of June, 1894.

[L. S.]

F. S. CHANNEL,
Clerk of Franklin County.

109 N. Y. Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
vs. }
BENTON TURNER, Appellant.

CITY AND COUNTY OF NEW YORK, ss:

Frank E. Smith, being duly sworn, says: I am the attorney and of counsel for appellant. No opinion was written by any justice of the general term of the supreme court on rendering the judgment appealed from in the above-entitled action.

FRANK E. SMITH.

Sworn before me this 4th day of June, 1894.

FRANK WALLING,
Notary Public, N. Y. Co.

110 Duplicate.

STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 9th day of April, in the year of our Lord one thousand eight hundred and ninety-five, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, Clerk.

Remittitur April 9th, 1895.

111 THE PEOPLE OF THE STATE OF NEW YORK, Resp'd't, }
ag'st }
BENTON TURNER, App'l'nt.

Be it remembered that on the 20th day of June, in the year of our Lord one thousand eight hundred and ninety-four, Benton Turner, the appellant in this action, came here into the court of appeals, by Frank E. Smith, his attorney, and filed in the said court a

notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and The People of the State of New York, the respondent in said action, afterwards appeared in said court of appeals, by Albert Hessberg, their attorney; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

112 Whereupon the said court of appeals, having heard this cause argued by Mr. Frank E. Smith, of counsel for the appellant, and by Mr. Albert Hessberg, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the said supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

113 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

GORHAM PARKS,

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

ALBANY, April 9th, 1895.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS, *Clerk.*

114 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
v.
BENTON TURNER, Appellant. }

(Decided April 9, 1895.)

Frank E. Smith for appellant.

Albert Hessberg for respondent.

GRAY, J.:

The appellant in this case is the same person, whose appeal was recently under review by us. (117 N. Y. 227.) The decision there made must be regarded as operative in the present ap-

peal. In the former case the action was to recover penalties for cutting trees upon certain lands in Franklin county, in this State; while in this case the action is one of replevin to recover logs taken by the defendant from other lands in that county. The facts, affecting the defendant's position towards the lands, differ in the two cases, in this: that in the earlier case the defendant was not in possession and showed no title to the lands and was, therefore, a trespasser; while in the present case he claims to have acquired the title and to have been in possession. Although we might safely rest the determination of this appeal upon the decision rendered in the previous case, where the question was treated as though the defendant had a right, as an owner of the property, to rebut the plaintiff's proof of title, I will, nevertheless, state briefly, the reasons for affirming this judgment.

The facts respecting the acquisition of title by the defendant are these, viz: That the defendant received in 1886 a deed from one Riley, who, in the same year, had acquired an interest in the lands by a conveyance from six of the eight children of one Norton. Norton had acquired the lands in 1872 from the Barnards, who appear to have held the same by tax title. Norton died in 1882 and subsequently to his death the conveyance to Riley was made by six of his children, which I mentioned. The plaintiff's title to the lands was acquired through a conveyance by the comptroller to the State October 12th, 1877. He had purchased the same at tax sales made for the unpaid taxes of the years 1866 to 1870, inclusive. His deed was made June 9th, 1881, and was recorded June 8th, 1882. The two years allowed for redemption had expired October 12th, 1879. Three years after the record of the people's deed, chapter 448 of the Laws of 1885 was enacted. That act provided that, "All conveyances that have been heretofore executed by the comptroller * * * after having been recorded for two years in the office of the clerk of the county, in which the lands conveyed thereby are located, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." The section further provided that, "All such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town
115 or ward having no legal right to assess the land on which they are laid." The lands in question are within what is known as the "forest preserve of the State of New York;" and the second section of the act of 1885 makes its provisions applicable to those counties which include the forest preserve. The six months mentioned in the act, within which tax sales and proceedings might be open to question after the act went into effect, expired December 9th, 1885. The forest commission had been established in May, 1885, and, by the act creating that commission, it was given the care, custody, control and superintendence of the forest preserve. A warden was employed by the forest commission, who discovered

the cutting of the timber by the defendant, and this action was then brought, in behalf of the people, by the forest commission.

Referring now to the points taken by the appellant, in objection to the right of the people to maintain their action against him, he claims that the tax sale of 1877 was illegal and void; for the reasons that the tax for the year 1867 was based on an assessment-roll verified before the third Tuesday of August and, as to the tax for the year 1870, that the tax-assessors had omitted to meet on the third Tuesday of August, as required by law. He further claims that these were jurisdictional defects, which the act of 1885 could not cure, and he also asserts the unconstitutionality of the act. As to the first objection, relating to the proceedings of the tax-assessors, I would observe, in the first place, that they were not jurisdictional defects, in any proper sense. They were irregularities in the proceedings for the assessment of the tax. Some confusion of thought may be occasioned by the ungarded language of Chief Judge Ruger in *People v. Turner* (117 N. Y. 227), who speaks of the irregular proceedings by the assessors as jurisdictional defects. But it is very clear that he did not intend the full force of that expression and that he used those words in the sense in which they were used by Judge Finch in *Ensign v. Barse* (107 N. Y. 329). In the latter case it was held that those defects only which went to the jurisdiction and authority of the assessors were not cured by the act of 1882. The defect there considered was the defective date of the assessors' certificate and that was deemed to be in the nature of an irregularity, merely. In *Joslin v. Rockwell* (128 N. Y. 338), it was held that the act of 1885, now in question, did not differ, in any material respect, from the act of 1882, which was discussed in *Ensign v. Barse*. The defects which the appellant here points out in the proceedings of the tax-assessors are not unlike, in their effect, to those which were relied upon in his former case. There they consisted of the alleged omission by the assessors to give notice of a review of the assessments in the years referred to, or to hold a meeting for such purpose, as required by the statute, and in closing and verifying the assessments prior to the time provided by law. Those irregularities of the assessors were considered by Judge Ruger in connection with the effect to be given to the comptroller's deed, after a certain lapse of time, under the act of 1885. It was held that

116 the act, in its principal aspect, was one of limitation and that, as such, it was within the constitutional power of the legislature to enact as affecting future cases and, as well, existing rights. The appellant concedes that under that decision the act of 1885 must be regarded as a statute of limitation; but he, nevertheless, insists upon a distinction in the facts between the two cases. He claims here to stand in the shoes of Norton, who was the owner of the lands at the time of the tax sale and of the passage of the act of 1885. As I apprehend his proposition, it is about this, viz: that while the act is operative in cases where the purchaser at a tax sale is in actual possession, it is invalid as against the owner of the lands who, at the time of the sale and of the passage of the act was, and remained, in possession, actual or constructive. By a process of in-

genious reasoning upon the theory of statutes of limitations, the appellant undertakes to show that the theory is inapplicable to the case of the owner in possession, to whom there does not merely, by reason of the tax sale, accrue any cause of action either to obtain title or possession, or to cancel the sale as a cloud upon title. The argument is that the sale was void and that the owner could rest upon its invalidity and defend himself whenever attacked. All that the appellant says, however, is practically an argument upon our previous decision and to obviate its effect. In the other case, while it was doubted whether a stranger, not in possession or claiming title and, therefore, not aggrieved, could raise the question of the invalidity of the act of 1885, in its operative effect upon the property of another, the opinion proceeded upon the assumption that the defendant had the right to rebut the plaintiff's proof of title and took up the question whether the owner of the property had been deprived of it without due process of law and an opportunity of being heard. That question enters the case in this way, namely, that the opportunity for the appellant to be heard before the assessors, at a meeting to be held, as provided by law, on the third Tuesday of August, was taken away from him by the fault of the assessors. In the other case, it was said, that the argument that a lawful exercise of the taxing power by the legislature requires that an opportunity to be heard before the taxing officers, in respect to the imposition of a tax, should be afforded to the tax-payer, or otherwise he is deprived of his day in court, fails if it can be shown that he was not actually, or substantially, deprived of that opportunity. Upon an examination of the statute under which the tax was levied, we thought that the tax-payer was not deprived of such notice and opportunity to be heard as the nature of the case required. We thought that while the act gave the tax-payer the right to appear before the assessors at the time stated, in order to persuade them to modify, or vacate, his assessment, that he still had, under the law, the right, in case of a neglect of the assessors to meet, of appeal to the board of supervisors at their next annual meeting; they having power to review and correct the assessment. "Ample opportunity is thereby given the tax-payer, if he feels aggrieved in

117 respect to assessments of his property, to be heard before the board of supervisors, who are vested with full power to afford all and any relief which was possessed by the assessors." The opinion was there expressed that, "the opportunity afforded the tax-payer to appear before the board of supervisors and challenge the legality and fairness of his assessment, was a satisfaction of his rights in respect to a hearing on the subject. It would have been competent for the legislature, while authorizing the imposition of taxes, to have omitted altogether the provisions requiring notice and a meeting by the assessors to review assessments, and to have provided only for a hearing before the supervisors in the first instance. * * * So long as the tax-payer is given the equivalent, therefore, the legislature has done all that is required of it under any view of the tax-payer's constitutional rights." The opinion then proceeds as follows: "But more than this. After the

tax has been returned to the comptroller, the tax-payer has still the right, both before and after the sale of his property, to appear before that officer and make proof of any illegality in the tax levy, and demand that such tax, and any sale made thereon, shall be canceled by him. (Citing the statutes.) And finally the act of 1885 itself provides for the exercise of the right of the comptroller to cancel taxes and sales illegally made, where the taxes have been legally paid, or where the town or ward had no legal right to assess the land. These rights were not only open to the tax-payer to exercise at any time previous to the act of 1885, but the right of all persons to exercise them was also preserved in all cases for six months after the passage of that act. * * * It would seem that the right of a property-owner to assert his title to property claimed by him, after such ample opportunities to protect such right had been afforded, could be regulated by a law of limitation without incurring the objection that his property had been taken without due process of law." The authoritative expressions in the opinion referred to, are applicable to the present case. Conceding the irregularity in the assessment proceedings to have been such as rendered the sale invalid, nevertheless, the assessors had the jurisdiction and authority to assess and if they erred in their proceedings, and neglected to take the steps which the statute required, there was, in the first place, the remedy of an appeal to the board of supervisors; and, in the second place, there was the opportunity to appear before the comptroller. By virtue of the act of 1885, that opportunity to appear before the comptroller and to demand the cancellation of the tax sale, because of irregularities of the proceedings leading to the sale, was continued for six months after the passage of the act. Differing from a case between the owner of lands and the purchaser thereof at the tax sale, where the comptroller would not have the power upon the application of the owner to cancel a tax title, here the State became the owner through the purchase and it was open to the owner to come before the comptroller and make proof of the invalidity of the sale through which the State derived its title. With the knowledge of the law,

118 the person claiming to be the owner of the land sold was chargeable; and when put upon his inquiry, as to the result of the proceedings, he discovered the State to have become the purchaser, it was incumbent upon him to take affirmative steps to cancel the sale, if he would recover his title to the lands. There may be considerable doubt with respect to the nature of the possession by Norton and of this appellant; but, however that may be, the State was constructively in possession through the comptroller's purchase and deed. The effect was that the State had resumed its ownership of the land and its title thereto was assured as the result of the proceedings, until invalidated by proof respecting the illegality of the proceedings leading to the tax sale. That title, by force of the provisions of the act of 1885, became unquestionable upon the expiration of the six months after it went into effect. While we think the people were not bound to take any steps towards actual possession, after the conveyance to them of the land, any

doubt upon the subject would seem to be eliminated by virtue of the provisions of the act which created the forest commission and placed the forest preserve, within which are the lands in question, in the care, control and supervision of the commission. The constructive possession which the State had acquired, I think, was made an actual possession by the powers and duties devolved upon the forest commission as its representative.

The appellant raises a final point, that there was an actual occupancy of part of the lands proven and, as no notice was served on the occupant, no title was acquired under the sale of 1877. It would seem that that objection was one of those which should be taken upon an application to the comptroller by the owner, within the time allowed by the act of 1885 to complain of the invalidity of the sale. But the objection in any view is quite untenable. The finding of the referee was that the land was wild, uncultivated and unimproved forest land; with a small natural meadow of about ten acres, upon which, some time after the year 1870, by the leave of Norton, the then owner, one Moody entered and cut and hauled away grass. Upon two occasions he had scattered a little grass seed and at times he had dammed up the brook, so as to overflow about half an acre. There was no residence, nor building upon the land, nor any cultivation or inclosure thereof, as was the case in *People ex rel. Chase v. Wemple* (144 N. Y., 478). We think the proof fell far short of establishing any such actual occupancy of the lands by any person, as called for a compliance with the provision of the law that a written notice to redeem must be served on the occupant.

I do not think it necessary to consider, at further length, the questions argued by the appellant. Enough has been said, in connection with our previous decision in this appellant's other case, to show that the judgment recovered by the people in this case was correct and should be affirmed, with costs.

All concur.

Judgment affirmed.

A copy.

H. E. SICKELS, *Reporter C.*

[Endorsed:] *People v. Turner.* Opinion. Gray, J.

119 UNITED STATES OF AMERICA, 88:

To The People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Benton Turner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the

Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

HENRY B. BROWN,

Associate Justice of the Supreme Court of the United States.

120 [Endorsed:] Due personal service of the within citation is hereby admitted. Dated April 23d, 1895. Albert Hessberg, attorney for The People of the State of New York, defendant in error. 1016, 15,900. May 15, '95.

121 [Endorsed:] Case No. 15,900. Supreme Court U. S., October term, 1894. Term No., 1016. Benton Turner, P. E., vs. The People of the State of New York. Citation & proof of service. Filed May 17, 1895.

Endorsed on cover: Case No. 15,900. New York court of appeals. Term No., 273. Benton Turner, plaintiff in error, vs. The People of the State of New York. Filed May 11th, 1895.

No. 273. 41.

Brief of Smith for P. E.

Filed Mar. 11, 1897.
Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 273.

BENTON TURNER, JAMES H. MCKENNEY,

against

Plaintiff in Error, CLERK.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

FRANK E. SMITH,

THOMAS F. CONWAY,

Counsel for Plaintiff in Error.

Plattsburgh, N. Y.

Supreme Court of the United States.

BENTON TURNER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF
NEW YORK
Defendant in Error.

October Term, 1896.
No. 273.

Error to the Court of Appeals of the State of New York.

Brief for Plaintiff in Error.

STATEMENT.

The Federal question presented for the consideration of the Court by the present record is, whether a statute of New York—chapter 448 of the Laws of 1885—is valid and constitutional.

The act in question was intended to validate all tax titles then existing to land in certain counties of the State. It provided in substance that all deeds theretofore executed by the Comptroller upon any tax sale, which had been on record for two years, should, after the lapse of six months from the passage of the act, be conclusive evidence of their own validity; but left them subject to cancellation, as then provided by law, by the

Comptroller or by any competent Court by reason of payment of the taxes, or want of power on the part of the town or ward levying them to assess the land.

The act further provided that it should not affect any action, proceeding or application then pending (June 9, 1885) or begun within six months thereafter to vacate any tax sale or deed.

Plaintiff in error denies the validity of this law when set up, as in the present case, by the State in its own favor.

The unusual feature of this statute, and of the litigation which has grown out of it, is, that by means of it the State is seeking, not to enforce collection of its revenues, but to acquire the land of its citizens for public use in evasion of the constitutional requirement of "just compensation."

Facts.

This is an action of replevin brought in the State Court by the People of the State of New York against Benton Turner, the plaintiff in error, to recover the possession or value of a quantity of logs. It was begun April 11, 1887. The complaint alleged that the State of New York was the owner and in possession of a tract of land known as the Southeast Quarter of Township 24, Great Tract One Macomb's Purchase, Franklin County, New York, which land was within and a part of the Forest Preserve of the State of New York; that between September, 1886, and March, 1887, Turner, the defendant below, wrongfully entered upon the land and cut and carried away spruce trees and converted them into saw logs, which he unlawfully detained from the plaintiff. The judgment demanded was the possession of the logs or their value, \$5,000 (Record, p. 7).

The answer was a general denial of the complaint and an allegation of title to and possession of the land in question (Record, p. 8).

The action was tried by a Referee (Record, p. 9).

Upon the trial the taking of a quantity of logs from the land in question and their value, \$1,250, was admitted (Record, pp. 17, 18).

The only question litigated was that of title.

The land in question is a tract containing 7,500 acres of wild forest land situated in the Town of Harriettstown, Franklin County (Record, pp. 10, 11 ; Finding X.).

The plaintiff below—the State of New York—claimed title under a sale of the land for unpaid taxes made by the Comptroller of the State in 1877 and a deed of conveyance to the People of the State of New York in pursuance of the sale, dated June 9, 1881, and recorded in the office of the Clerk of Franklin County, N. Y., on June 8, 1882 (Record, p. 17 ; p. 48, 20th and 21st Findings).

The defendant claimed under the original Macomb Patent of 1798, his immediate predecessor in title being one Christopher F. Norton (Record, p. 18).

The Trial Court found that at the time of the tax sale, October 12, 1877, Norton was the owner in fee simple of the land in question and had actual or constructive possession (Record, p. 51 ; First Finding of Law).

In June, 1877, a judgment for \$59,178.22 was recovered against Norton and docketed in Franklin County (Record, p. 18, Ex. 4). In 1882 Norton died intestate, leaving a widow and eight children, two of whom were infants, his only heirs-at-law (Record, p. 18, Ex. 5).

In December, 1886, the adult heirs of Norton conveyed the land in question to Riley who, a few days later, conveyed to Turner (Record, p. 18, Exs. 11 and 12).

Proceedings were then had to revive the judgment against Norton, and in April, 1887, execution was issued thereon to the Sheriff of Franklin County, who on June 18, 1887, sold the land to Turner for \$6,000, and on February 18, 1889, executed and delivered to him the usual sheriff's deed (Record, p. 18, Exs. 6, 7, 8, 9 and 10.)

Neither the State nor any officer on its behalf ever took actual possession of the land (Record, p. 10, Finding IX.: p. 50, Findings 30 and 31).

The tax sale of 1877 was made for the unpaid taxes of 1866 to 1870, both inclusive, amounting to \$1,266.46 (Record, p. 10, Finding VI.).

The defendant upon the trial asserted that the taxes of 1867 and 1870 were illegal, and consequently that the sale of 1877 was void. The point alleged against the tax of 1867 was that the assessors verified the assessment roll before the third Tuesday of August, that being the earliest day at which it was possible for the roll to be legally completed.

The tax of 1870 was challenged because the assessors wholly failed to meet to review their assessment, as required by law, and wholly failed to verify the roll.

Defendant, to prove the illegality of the tax of 1867, produced the copy assessment roll from the office of the Town Clerk, it being admitted that the original in the County Treasurer's office had been burned, which showed upon its face that it was verified by the assessors on August 10, 1867 (Record, p. 33, Exhibit C).

Defendant also called as a witness one of the assessors of 1867, and offered to prove by him that in 1867 the roll was verified before the third Tuesday of August (Record, p. 31, 32).

As to the tax of 1870, defendant produced the copy roll (it being admitted that the original had been burned), which contained no affidavit of the assessors, and also called two of the three assessors of that year, and proved by them their failure to meet on the third Tuesday of August (Record, pp. 31-33, Exhibit F).

Defendant also offered to show that the warrants attached to the copy rolls of 1867 and 1870—Exhibits C and F—were the original warrants, and that the signatures of the Supervisors were genuine (Record, p. 33).

The plaintiff objected to the evidence offered to show

what was actually done or left undone by the assessors of 1867 and 1870, upon the ground that chapter 448 of the Laws of 1885 rendered such facts immaterial and prohibited investigation into them. Defendant replied to the objection that the law invoked was repugnant to the Fourteenth Amendment of the Constitution of the United States. The Trial Court sustained the objection and excluded the evidence, defendant excepting (Record, p. 31).

The assessment rolls of 1867 and 1870 were received temporarily subject to the same objections (Record, p. 33). At the close of the trial plaintiff moved to strike out the rolls as immaterial and irrelevant, under chapter 448 of 1885. Defendant opposed the motion on the ground that said statute was a violation of the Fourteenth Amendment to the Federal Constitution. The Court granted the motion and struck out the rolls, defendant excepting (Record, p. 44).

The Referee thereafter made a decision in favor of the plaintiff—the State of New York—in which he found that the tax sale of 1877, “and all proceedings prior thereto, from and including the assessment of the land, * * * were regular * * * according to the provisions of chapter 427 of the Laws of 1855, and all laws directing or requiring the same, or in any manner relating thereto, by virtue of the rule of evidence and limitation prescribed by chapter 448 of the Laws of 1885” (Record, p. 12, First Conclusion of Law).

To this finding defendant duly excepted (Record, p. 15, 4th exception). Defendant, also, in accordance with the practice which prevailed in the State of New York at the time of the trial (1889), required the Referee to rule on certain specific propositions—among others, that the assessors of the Town of Harriettstown verified the roll of that year on August 10, and not thereafter; that the roll of 1867 so verified was the

one upon which the Supervisors of the County acted in levying the tax of that year, which was one of the taxes for the non-payment of which the sale of 1877 was made; and that in 1870 the assessors of said town did not meet on the third Tuesday of August, or on any day thereafter, to review their assessment.

Each and all of these requests were refused by the Referee upon the ground that "plaintiff's deed is conclusive evidence to the contrary" (Record, p. 49, 23d, 24th and 25th Requests).

To these refusals, and each of them, exceptions were seasonably and separately taken by defendants (Record, p. 15).

The defendant also requested the Referee to find as matter of law that chapter 448 of Laws of 1885, considered either as a curative law or as a statute of limitation when set up in favor of the State, was repugnant to the Fourteenth Amendment of the Federal Constitution, which requests, and each of them, were refused, and exceptions taken (Record, p. 53, Fourteenth and Seventeenth Requests; exception, p. 16).

The position of the learned Referee before whom the cause was tried, as regards the effect of the statute now in question was expressed by him in his opinion, as follows (Record, p. 54):

"The objections that the assessment roll for 1867
 "was not verified after the tenth day of August and
 "that the assessors did not meet in 1870 for review
 "of their assessments are obviated by chapter 448 of
 "the Laws of 1885. Indeed, the effect of this enactment being to make the conveyance under which
 "the plaintiff claims conclusive evidence, under the
 "circumstances of this trial, of regularity in these respects, it cannot be found that such objections have
 "any basis of fact; nor is this statute unconstitutional in that regard" (citing *People ex. Turner*, 117 N. Y., 227).

Judgment was duly entered upon the report of the Referee in favor of the State of New York for \$2,198.60.

Defendant appealed therefrom to the General Term of the Supreme Court of the State, which affirmed the judgment. He then appealed to the Court of Appeals of the State, which affirmed the judgment.

ASSIGNMENT OF ERRORS.

The State Court erred in holding that Chapter 448 of the Laws of New York of 1885 was valid and constitutional; and, in overruling the claim of plaintiff in error, that said law was repugnant to the Fourteenth Amendment of the Federal Constitution.

The error above assigned runs through the whole record, and led the Trial Court to make a number of rulings to which exceptions were taken, upon which error is further assigned as follows :

I.—*The Court erred in finding that the tax sale of 1877 and all proceedings leading up to it were regular by force of the rule of evidence and limitation contained in said chapter 448 (Record, p. 12; First Finding of Law).*

II. *The Court erred in rejecting the testimony of the witness Torrance as to whether he verified an assessment roll before the third Tuesday of August because made immaterial by said chapter 448 (Record, p. 31).*

III.—*The Court erred in rejecting as immaterial under said chapter 448 the testimony of the witness Miller that the signatures to the warrants attached to the copy rolls produced from the Town Clerk's office for the years 1867 and 1870 were the genuine signatures of the Supervisors of Franklin County (Record, p. 33).*

IV.—*The Court erred in striking out the assessment rolls of 1867, 1868, 1869 and 1870 as irrelevant and immaterial under said chapter 448 (Record, p. 44).*

V.—*The Court erred in refusing to find that the assessment roll of 1867 was verified on August 10; such refusal being based solely on the ground that by said chapter 448 the Comptroller's deed was conclusive evidence to the contrary (Record, p. 49; 23d Request).*

VI.—*The Court erred in refusing to find that the assessors did not meet in the year 1870 to review their assessments, such refusal being based solely on the ground that by said chapter 448 the Comptroller's deed was conclusive evidence to the contrary (Record, p. 49; 25th Request).*

VII.—*The Court erred in refusing to find that said chapter 448, in so far as it attempts to validate past tax sales, which were void when made, is repugnant to the Fourteenth Amendment to the Federal Constitution (Record, p. 53; 14th Request).*

VIII.—*The Court erred in refusing to find that said chapter 448, considered as a statute of limitation, and with reference to tax sales made before its passage to the People of the State of New York, which sales were illegal and void when made, is repugnant to the Fourteenth Amendment to the Federal Constitution.*

Before proceeding to discuss the validity of the law of New York which is assailed by this writ of error we desire to call the attention of the Court to the public policy of that State in regard to acquiring forest lands in the Adirondack Mountains for a public park, as shown by statutes and public documents; and the consequent reversal of the attitude of the State toward its citizens in regard to the purchase of lands at tax sales.

The statutes of the State for many years past have provided for the sale of non-resident lands for unpaid taxes. Such sales are made by the Comptroller, and he is authorized to bid in for the State lands upon which there is no bidder (see Revised Statutes of 1828, vol. 1, pp. 407-414; chap. 427 of 1855, sec. 66. Appendix, p. 52).

The Revised Statutes in regard to tax sales were superseded by chapter 298 of 1850, under which act sales were made by the County Treasurers, but this act was in turn superseded by chapter 427 of the Laws of 1855, which was a substantial re-enactment of the Revised Statutes. Liberal provision was made for redemption within a given time after the sale (chap. 427 of 1855, secs. 50-56. Appendix, p. 48); for redemption because of occupancy, in whole or in part, at any time after the sale, unless a particular notice were given the occupant (secs. 68-74. Appendix, pp. 53-55); for the assignment by the Comptroller of bids made by him on behalf of the State (secs. 66, 67. Appendix, pp. 52, 53), and, finally, for the cancellation at any time of invalid sales (secs. 83-85. Appendix, pp. 57, 58).

Under these statutes, and an administration of them by the Executive branch of the State Government perhaps more liberal than the letter of the law would warrant, the sale of land *to the State* for unpaid taxes was treated as a continuation of the tax lien rather than a transfer of title; the policy of the State being to accept from the land-owner the amount of the taxes, interest and costs, and by cancellation, assignment or redemption to annul the sale.

At the tax sales of 1877 and 1881 upward of 700,000 acres of land in the northern part of the State were bid in by the Comptroller on behalf of the State (see report of Forest Commission to the Legislature of 1885).

About 1880-1885 public sentiment became pronounced in favor of preserving the forests of the State.

In 1883 the sale of land, belonging to the State in the forest counties was forbidden (chap. 13 of 1883. Appendix, p. 89). In 1885 a Forest Preserve was created, consisting of the land then owned, or thereafter acquired, by the State in certain counties constituting the Adirondack region, which lands were declared inalienable (chap. 283 of 1885. Appendix, p. 90).

The holdings of the State within the forest counties had been acquired almost entirely at tax sales. Its titles thereto were notoriously precarious. It was therefore important to protect and validate those titles, and for that purpose chapter 448 of the Laws of 1885—the statute now in question—was enacted. This act only applies to the forest counties.

The power of cancelling illegal tax sales, which had been claimed and exercised by the Comptroller since about 1823, was nullified by judicial action, the Court of Appeals deciding that the remedy of cancellation given by the statute could not be invoked by the owner of the land sold.

People ex rel. Wright vs. Chapin (1887),
104 N. Y., 369.

The right of redemption on the ground of occupancy, which had been unlimited in point of time, was, as to past sales, materially limited by chapter 556 of 1890 and 463 of 1892 (Appendix pp. 84-87).

By chapter 624 of 1892 a certain class of tax sales—*i. e.*, those made by the County Treasurers in four of the forest counties between 1850 and 1855—were declared to be legal and valid (Appendix p. 88).

In short the reversal of public policy as regards the tax sale of forest lands was complete.

In his report to the Legislature of 1892, Comptroller Wemple said, pages 37, 39 :

“Substantially all the State's lands within the
“Forest Preserve have been acquired through

" purchases at tax sales of land sold by the Comptroller as required by law for unpaid taxes returned to this department by the several County Treasurers."

* * * * *

" The policy of the State has always been, until within recent years, not to purchase lands that are sold for unpaid taxes unless actually required to do so for want of other bidders, and then to permit the taxpayers to recover the same by liberal treatment upon reimbursing the treasury for the taxes, interest and legal charges thereon.

" Now, it seems to be the policy of the State to obtain title to all forest lands within the Forest Preserve upon tax sales, if possible, and to maintain such title, and to resist applications of the former owners and their grantees to cancel the same or to redeem therefrom under the laws of the State, by methods that cannot be deemed liberal or fair in many instances.

" The law has always favored the right of redemption, but now a different principle in such cases is sought to be enforced in redemptions from tax sales of land situated within the Forest Preserve, which is contrary to that usually applied to redemptions affecting land situated elsewhere. The State cannot afford to be unjust in dealing with its citizens."

In his report for 1893 Comptroller Campbell said, page 41 :

" Substantially all the lands now held by the State have been acquired through tax sales, and the title to a considerable portion of such lands has been, and will doubtless continue to be, the subject of contention and dispute.

* * * * *

" The object and purpose of a tax sale is, pri-

"marily at least, the collection of the tax rather
 "than the acquisition by the State of the lands
 "upon which it is a lien; but since it became the
 "policy of the State to acquire title to lands within
 "the Forest Preserve, the object sought to be at-
 "tained seems to be the acquisition of such lands
 "rather than the collection of the taxes due there-
 "on." * * *

"It was formerly the policy of the State not to
 "purchase land at the tax sales except when com-
 "pelled to do so for lack of bidders, and to give a
 "liberal construction to the statutes regulating
 "redemptions and cancellations, and give to per-
 "sons whose lands had been sold for taxes every
 "opportunity for redeeming them on payment of
 "the taxes due thereon with interest, together with
 "the expenses of the sale

"Within the past few years this policy has been
 "changed and the State has sought to acquire
 "title to all forest lands within the Preserve sold
 "for taxes, and to resist by every means in its
 "power application for the cancellation of or
 "redemption from such sales" (p. 42).

See also as to the public policy of the State in regard
 to forest lands. *Matter of Long Lake R. R. Co.* (1896),
 11 App. Div., 233.

To carry into effect the change in public policy re-
 ferred to in the foregoing extracts from the reports of
 the Comptroller of the State, the statute now in ques-
 tion was enacted. It was an amendment to the existing
 general tax law of 1855, and is as follows:

Laws of 1885, Chapter 418.

AN ACT TO AMEND CHAPTER FOUR HUNDRED AND TWENTY-SEVEN OF THE LAWS OF EIGHTEEN HUNDRED AND FIFTY-FIVE ENTITLED "AN ACT IN RELATION TO THE
" COLLECTION OF TAXES ON LANDS OF NON-RESIDENTS
" AND TO PROVIDE FOR THE SALE OF SUCH LANDS FOR
" UNPAID TAXES." PASSED JUNE 9, 1885.

SECTION 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

SEC. 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive

evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances, or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

SEC. 2. The provisions of this act are hereby made applicable only to the following counties, viz.: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

SEC. 3. This act shall take effect immediately.

ARGUMENT.

FIRST.

The sale of the land in question at the tax sale of 1877 for the unpaid taxes of 1867, 1868, 1869 and 1870 was illegal and void when it was made and the deed made in pursuance of it was wholly inoperative as a transfer of title.

This proposition is substantially conceded. Legislation to validate a past tax sale assumes the original invalidity of the sale.

The reasons why the sale was void when it was made are :

(1) *The tax of 1867 was illegal and void because based on an assessment roll verified by the assessors before the third Tuesday of August.*

The course of procedure required by the New York statutes in regard to assessing land for taxation as it was in 1867 was as follows :

(a) Assessment roll to be made up by the assessors between May 1 and August 1.

1 R. S., p. 390, sec. 8, and p. 393, sec. 19.
Appendix, pp. 7, 11

(b) Notice to be given to taxpayers immediately after August 1, of the completion of the roll and that the assessors will meet on the third Tuesday of August to review their assessments.

1 R. S., p. 393, sec. 20, as amended by
chap. 536 of 1857. Appendix, p. 11.

(c) Roll to be verified by the assessors in a certain prescribed form, when it shall be finally completed.

Chap 176 of 1851, sec. 8. Appendix, p. 31.

(d) The verified roll to be delivered to the Supervisors of the town on or before September 1.

1 R. S., 394, sec. 27. Appendix, p. 12.

(e) The Supervisors to deliver the roll to the Board of Supervisors, who shall fix the amount of tax, issue a warrant under their hands and seals for its collection, attach it to the roll, or a copy thereof, and deliver it to the town collector on or before December 15.

1 R. S., 395, secs. 33, 35, 36. Appendix,
pp. 13, 14.

It is the settled law of New York that an assessment roll cannot be legally completed until the third Tuesday of August, and if verified before then it is void.

Westfall *vs.* Preston (1872), 49 N. Y., 349.

In the case cited the roll was verified by the assessors on July 29, 1865. A tax based on this roll was levied by the Board of Supervisors and the usual warrant issued and delivered to the collector, who, in obedience to it, levied on the property of one of the persons named in the roll to collect the tax imposed. An action was thereupon brought against the supervisors and collector and it was held that the tax was void and that the officers who imposed and sought to collect it were liable as trespassers.

ALLEN, *J.*, says (p.p. 353-355):

"A substantial compliance with the statute in the measures preliminary to the taxation of persons and property, in all matters which are of the substance of the procedure, and designed for the protection of the taxpayer and the preservation of his rights, is a condition precedent to the legality and validity of the tax. Among the preliminaries essential to the jurisdiction of the supervisors is the preparation of an assessment roll containing a list of the persons and property liable to taxation, with the estimated value of the property, prepared and verified by the assessors, and a substantial compliance with the terms of the statute prescribing the verification is necessary to give the board of supervisors jurisdiction to impose a tax and issue their warrant to the collector for its collection. * * *

"In the nature of things, and in the sequence prescribed by the statute, the roll cannot be

“verified until the time for review and the hearing of objections is passed, and the objections, if any are made, are disposed of. The roll is not, and cannot be, completed until then, and the duty of the assessors in preparing the roll and making the assessments cannot be fully performed and ended until after the third Tuesday of August, the day assigned by statute for the meeting of the assessors to review their assessments. * * *

“The affidavit of the assessors to the assessment roll before us was made on the 29th of July, although it purported to have been made on the 26th of that month. But the assessors could not by law then make the affidavit required. They had other duties to perform to complete the roll before it could be verified, and the time had not arrived when by law they could declare it completed and verify it as the completed and perfected roll. The affidavit was a nullity, and the defect appearing on the face of the paper by the date of the jurat, it conferred no jurisdiction upon the board of supervisors to impose a tax upon persons or property named therein.

“It follows that the supervisors imposing the tax and signing the warrant to the collector were without jurisdiction and liable as trespassers.”

We do not find that the precise point has been again before the New York Court of Appeals, but the decision in *Westfall vs. Preston* has become one of the leading cases in the law of tax titles, and has been many times cited and approved.

Jewell vs. Van Steenburgh (1874), 58 N. Y., 85, 90.

Bradley vs. Ward (1874), 58 N. Y., 401, 406.

Thompson *vs.* Burhaus (1874), 61 N. Y., 52, 65.

People *vs.* Suffern (1877), 68 N. Y., 321, 326.

Brevoort *vs.* City of Brooklyn (1882), 89 N. Y., 128, 132.

Shattuck *vs.* Bascom (1887), 105 N. Y., 39, 45.

People *vs.* Turner (1889), 117 N. Y., 227, 235.

In *Brevoort vs. City of Brooklyn* (1882), 89 N. Y., 128, EARL, *J.*, speaking of the decision in *Westfall vs. Preston*, says (p. 133) :

“ In that case the verification of the assessment roll was made before the time for its final completion, to wit, the third Tuesday of August, and it was held to be an absolute nullity, and that the supervisors had no jurisdiction to impose a tax upon the persons or property named in the assessment roll.”

In *Smith vs. Mosher* (1890), 31 St. Rep., 235, the precise point was before the General Term of the Supreme Court of the State, and it was again held, following *Westfall vs. Preston*, that an assessment roll verified before the day on which the assessors (or in that case village trustees acting as assessors), met to review the roll, was a nullity, and that the trustees acting under it were trespassers.

(2) *The tax of 1870 was illegal, because the assessors did not meet on the third Tuesday of August to review their assessments.*

People *vs.* Turner (1889), 117 N. Y., 227.

In the case cited—another litigation between the present parties—RUGER, *C. J.*, said (p. 234) :

“It may be conceded that, in the absence of a curative act, an omission by the assessors to hold meetings for the review of their assessments, and to give notice therefor as required by statute, is a jurisdictional defect, which, in a proceeding between the owner and any one claiming a right in such property under a tax sale, renders such sale irregular and void.”

(3) *A sale of land for the taxes of several years is wholly void if any one of the taxes for which the sale is made be illegal.*

People vs. Hagadorn (1887), 104 N. Y., 516.

Shattuck vs. Bascom (1887), 105 N. Y., 39.

(4) *A sale of land for illegal taxes is a nullity, and the deed made in pursuance of it is void and does not in any way affect either the title or possession of the owner.*

Johnson vs. Elwood (1873), 53 N. Y., 431.

Thompson vs. Burhans (1874), 61 N. Y., 52, 67.

Johnson vs. Elwood (1873), 53 N. Y., 431, was an action of replevin for logs. Plaintiff claimed the land from which the logs were cut under a tax sale. The Comptroller's deed to him had been duly recorded.

ANDREWS, J., says (pp. 433, 434) :

“His title to the land rests upon the Comptroller's deed executed on the sale for taxes in 1862.
“It is undisputed that at that time the lots were unfenced, wild and unoccupied, and there were no acts of ownership on his part after the purchase beyond the appointment of an agent, a single entry on the land, and the payment of taxes. It was necessary, therefore, for the plaintiff to show a constructive possession of the land, and as the constructive possession follows the legal

" title, if the deed from the Comptroller was valid
 " the right of action was maintained (*Van Rensse-*
 " *laer vs. Van Rensselaer*, 9 Johns, 377; *Wickham*
 " *vs. Freeman*, 12 *id.*, 183; *Hubbell vs. Rochester*, 8
 " *Cow.*, 115). If that deed was void the plaintiff
 " has no ground to stand upon. It did not divest
 " the title of the real owner, nor did it confer
 " any right as against any one. * * * A con-
 " structive possession of the premises from which
 " the logs were taken cannot arise upon a void
 " conveyance. This view is in accordance with
 " what I understand to be the settled law in this
 " State (*Bloom vs. Burdick*, 1 Hill, 130; *Sharp vs.*
 " *Speir*, 4 *id.*, 76, 86; *Gardner vs. Heart*, 1 N. Y., 528;
 " *Tallman vs. White*, 2 *id.*, 66; *Dike vs. Lewis*, 4
 " *Den.*, 237; *Doughty vs. Hope*, 3 *id.*, 594; *Beck-*
 " *man vs. Bigham*, 5 N. Y., 366; *Whitney vs.*
 " *Thomas*, 23 N. Y., 281).

The defect in the proceedings which in this case was held to render the deed void was the failure of the assessors to verify the roll.

In the *Thompson-Burhans* case, 61 N. Y., 52, EARL, J., says (p. 67):

" By virtue of the tax sale the plaintiff either
 " has a valid title or he has none. If all the
 " steps required by law were taken to authorize a
 " conveyance by the Comptroller, the plaintiff's
 " title is valid. If such steps were not taken, then
 " the title of the owners at the time of the tax sale
 " was not divested, and the plaintiff acquired no
 " title."

It follows that the tax sale of 1877, and the Comptroller's deed to the State in pursuance of it, were wholly ineffectual to deprive the then owner—Norton—of his title to and possession of the land. He remained, after the deed, as he was before, seized in fee and in

possession. The State had attempted to deprive him of his title and had failed.

It remains to consider whether what the tax proceeding and deed did *not* accomplish has been done by legislation—whether the title which remained in Norton, notwithstanding the formal sale and conveyance, has since been transferred to the State.

SECOND.

Chapter 418 of the Laws of New York of 1885 is repugnant to the Fourteenth Amendment of the Federal Constitution, in that it deprives the citizen of his property without due process of law.

The act in question seem to have three aspects :

First.—*A curative law simply.*

Second.—*A law establishing a rule of evidence.*

Third.—*A limitation law.*

I.

THE ACT IN QUESTION CONSIDERED AS A CURATIVE LAW SIMPLY IS VOID.

The Comptroller's deed having been void when it was made, and wholly inoperative to divest the title or possession of the then owner, it was not in the power of the Legislature to convert it from a nullity into a valid and operative deed. This would be to transfer property from the owner to a stranger by mere legislative *fiat*.

Such legislation is not due process of law.

Cromwell *vs.* MacLean (1890), 123 N. Y., 474, 489-494.

Denny *vs.* Mattoon (1861), 2 Allen, 361.

Forster *vs.* Forster (1880), 129 Mass., 559.

Orton *vs.* Noonan (1868), 23 Wis., 102.

Hodgdon *vs.* Burleigh (1880), 4 Fed. Rep., 111, 128.

The case of *Cromwell vs. MacLean* (1890), 123 N. Y., 474, seems to be ample authority to warrant the assertion that in the view of the New York Court of Appeals, the act in question has not been and cannot be sustained as a curative law. In that case land in Westchester County had been sold for taxes which were illegal because the provisions of the statute in regard to the form and manner of making up the assessment roll had not been obeyed, the assessment being against the "Estate of Edward J. Wilson," instead of in the name of the person who had succeeded to his title. After leases had been executed in pursuance of the sale, the Legislature enacted that "All sales heretofore had of lands in said county for the non-payment of taxes, under and by virtue of the act hereby amended, are hereby confirmed," etc.

This act was held unconstitutional, PECKHAM, J., saying (p. 489):

"Holding, as we must, that no title or interest
 "in fact passed to the purchaser at these tax sales,
 "and that the original owner, therefore, still
 "retained his title, the effect of the act in question,
 "if valid, is by legislative *fiat* to transfer the title
 "of the property of Edward C. Wilson, as trustee,
 "to the lessees under these invalid leases for a
 "hundred or a thousand years, as the case may
 "be. Has the Legislature of this State the right
 "to take the property of A and transfer it to B,
 "under the guise of confirming sales made of
 "such land *in invitum*, but by which no title, in
 "fact or in law, passed from the owner to the
 "purchaser? The statement of the question

"should be its best answer. Property thus taken
 "is not taken by due process of law.

In *Forster vs. Forster* (1880) 129 Mass., 559, the collector in advertising the land for sale stated that he would sell the land described or "such undivided portion thereof as may be necessary." This last clause was improper, as such mode of sale was unauthorized by the statute. It does not appear whether the sale as actually made was of the whole or of an undivided interest. The Courts having decided that sales made in pursuance of such a notice were void, the Legislature enacted that they should *not* be held invalid, saving suits pending and cases of land sold since the date of the decision holding such sales void. This statute was held unconstitutional as depriving the land-owner of his property.

We do not deny entirely the validity of retrospective legislation designed to cure imperfections and irregularities relating to the title to land. But when the State has attempted to sell the land of the citizen and has wholly failed, there is no room for such legislation. The appropriate sphere for a *cure* law would seem to be with reference to proceedings which had originally some life in them. To give legal effect and validity to a deed which was void when made is to create rather than to cure.

In the *Forster* case above cited (129 Mass., 559), will be found a classification by Chief-Justice GRAY of the cases in which retroactive legislation has been sustained. One of these classes is :

"5th. Cases of statutes confirming informal or
 "irregular assessments of taxes, so that they might
 "be collected in the future, but not undertaking to
 "give force to illegal seizures or sales of property
 "already made."

So far as the cases relate to statutes validating deeds purporting to convey land, we think they may all be embraced under two heads, namely, cases of voidable deeds sufficient to transfer the legal title, but which are liable to attack ; and cases in which the transaction between the parties is sufficient to give an equitable title to the person who has attempted to obtain the legal title. In other words, a person seeking the benefit of a curative law must already have some legal or equitable title (though imperfect) to the land. One claiming under a tax deed is not so situated. *He* has by virtue of his deed either the whole or nothing—a perfect title or none at all. There is no such thing as a *voidable* tax deed. Neither is there any equity in a tax title. Such a claimant stands upon the law alone, and by the law must his claim be judged (see opinion of GRAY, C. J., in *Forster vs. Forster* (1880), 129 Mass., 559, 561, and *Miller vs. Cook* (1890), 135 Ill., 190, 207).

There is a wide distinction as regards the power of the Legislature to enact curative laws between tax proceedings which have not yet culminated in a sale and a formal but void conveyance of land for taxes. As to tax proceedings, merely, we concede the almost absolute power of the Legislature. As to them the rule laid down by Judge Cooley may well enough apply :

“ If the thing wanting or which failed to be
 “ done, and which constitutes the defect in the pro-
 “ ceedings, is something the necessity for which
 “ the Legislature might have dispensed with by
 “ prior statute, then it is not beyond the power of
 “ the Legislature to dispense with it by subsequent
 “ statute. And if the irregularity consists in doing
 “ some act, or in the mode or manner of doing
 “ some act, which the Legislature might have made
 “ immaterial by prior law, it is equally competent
 “ to make the same immaterial by a subsequent

"law" (Cooley's Constitutional Limitations, 6th Ed., p. 457).

In *Mattingly vs. District of Columbia* (1878), 97 U. S., 687, the rule as above stated was approved by this Court.

The defects in the tax proceedings shown in the present case anterior to the sale—the improper verification of the roll, and the failure of the assessors to meet to review their assessments—might no doubt have been cured as regards the tax itself, giving, of course, an opportunity to the land-owner to pay the tax when validated, and in default of payment the land might then have been sold.

Cromwell vs. MacLean (1890), 123 N. Y., 474, 490.

Mattingly vs. District of Columbia (1878), 97 U. S., 687.

It will no doubt be argued that the defects in the proceedings anterior to the sale in the present case were not "jurisdictional," and therefore that the Legislature has the same power as against such defects to give effect to a tax deed that it had to cure the tax itself. If it be meant by this that notwithstanding their existence, the Comptroller's deed to the State was valid and effectual, the answer, of course, is that, whether called "jurisdictional" or not, they did by the settled law of New York, as already shown, render that deed a nullity. If, however, the argument based on this word concedes the original invalidity of the Comptroller's deed by reason of those defects, and simply seeks to build up a distinction between deeds void for defects jurisdictional and those non-jurisdictional (relying probably on *Ensign vs. Barse* [1887], 107 N. Y., 329, 346), then we say that there is no room for such a distinction. A tax deed is

void, if at all, because of a failure on the part of public officials to obey the law. It may be conceded that some provisions of tax laws are advisory merely, and that if these be disregarded, the proceedings are nevertheless valid. But as to all mandatory provisions of law the consequence of disobedience is the same—invalidity. Why should it matter whether the particular provision might or might not have been dispensed with? The deed is a nullity in either case. To allege difference of degree, as between two nullities, seems to involve a contradiction. To assert that one tax deed is void, and that another is *more* void, is absurd. Yet this seems to be the very proposition implied by Judge Finch in his opinion in *Ensign vs. Barse* (107 N. Y. 329), where he says that a defect may be “jurisdictional” to avoid a tax deed under the law as it was at the time of sale; but not “so jurisdictional” as to be beyond the reach of legislation.

In *Cromwell vs. MacLean* ([1890] 123 N. Y., 474), PECKHAM, J., says (p. 492):

“I think it safe to say that sales made without
 “authority and by which no title passed could not
 “be so far validated as to transfer a title by legislative fiat. If the Legislature have designated a
 “certain way in which to make an assessment, although it could easily have designated some
 “other just as legal, yet the manner designated
 “must in substance be carried out, although many
 “of the provisions might have been omitted by the
 “Legislature, and a constitutional assessment still
 “levied. If any of those provisions of a material
 “nature have been omitted, so that no valid assessment has been made, and no title transferred to
 “the person assuming to purchase at the subsequent tax sale, I am fully persuaded there is no

" power in the Legislature to pass any act the ef-
 " fect of which shall be to thereby transfer the title
 " of the original owner to the purchaser, to the
 " same extent as if the whole proceedings from as-
 " sessment to sale had been valid. This can-
 " not be done under the guise of confirming
 " sales of lands theretofore made for the non-
 " payment of taxes. If such proceedings have
 " been so far futile as to leave the title to his
 " property in the original owner, notwithstanding
 " the attempt to transfer it by the statutory pro-
 " ceedings, no legislative act can take such title
 " from him and transfer it to another. This an-
 " swers the question asked by defendant's counsel,
 " in referring to the case of *Shattuck vs. Bascom*
 " (105 N. Y., 39), whether the Legislature, having
 " power to dispense with the assessor's oath in the
 " first instance, could not have validated a sale made
 " upon an assessment in which the oath actually
 " taken was so defective as to amount to a fatal
 " variance from the statute? The variance was
 " such as to render the assessment void (*Shattuck*
 " vs. *Bascom*, *supra*; *Brevoort vs. City of Brook-*
 " *lyn*, 89 N. Y., 128), and hence no title passed
 " under the tax sale. In such case there can be
 " no doubt that the legislative power stops far
 " short of transferring the title by the simple
 " process of attempting to confirm this void sale."

In both *Cromwell vs. McLean* and *Forster vs. Forster*,
 the defects which rendered the proceedings void were
 not "jurisdictional" in the sense that any constitu-
 tional right of the taxpayer had been violated. On the
 contrary, they were acts or omissions which the Legisla-
 ture might lawfully have authorized. It is true that the
 Legislature of New York has not seen fit to allow the
 assessment of a decedent's estate in the name of the
 dead man, or as the property of his heirs or devisees.

It might do so if it chose. In Massachusetts such an assessment is authorized.

Tobin *vs.* Gillespie (1890), 152 Mass., 219.

Neither has the Legislature of Massachusetts seen fit to allow the sale of an undivided interest in the land, but plainly it might do so.

Black on Tax Titles, 2d ed., secs. 263, 265.

In further support of the general proposition that a void tax deed cannot be made valid by a curative law, see—

Lennon *vs.* The Mayor (1874), 55 N. Y. 361.

Hall *vs.* Perry (1888), 72 Mich., 202.

Magruder *vs.* Esmay (1878), 35 Ohio St., 221.

Marsh *vs.* Chesnut (1852), 14 Ill., 223.

Cowgill *vs.* Long (1853), 15 Ill., 202.

Conway *vs.* Cable (1865), 37 Ill., 82.

II.

Chapter 448 of 1885 considered as an act establishing a rule of evidence merely is unconstitutional and void.

Prior to the passage of the act in question tax deeds were *prima facie* evidence of the regularity of the prior proceedings. By this act all such deeds which have been on record for two years are made, after the expiration of six months, *conclusive* evidence that all the proceedings leading up to such deed were had in strict conformity with the law. In other words, the deed is conclusive evidence of its own validity.

This, we contend, the Legislature cannot do, even as

to prospective sales; *a fortiori* it cannot do so as to the past.

Marx *vs.* Hanthorn (1893), 148 U. S., 172.

Baumgardner *vs.* Fowler (1896), 82 Md., 631.

In the case first cited a statute of Oregon declared that all tax deeds should create a presumption of the regularity of the proceedings, and that the presumption should not be disputed or avoided except by proof of certain facts. With this law in force the tax sale in question was made and proof of other matters than those permitted by the statute was relied on to avoid the deed.

SHIRAS, J., (p. 182) :

“ Without going at length into the discussion of
 “ a subject so often considered, we think the con-
 “ clusion reached by the courts generally may be
 “ stated as follows : It is competent for the Legis-
 “ lature to declare that a tax deed shall be *prima*
 “ *facie* evidence, not only of the regularity of the
 “ sale, but of all prior proceedings, and of title in
 “ the purchaser, but that the Legislature cannot
 “ deprive one of his property by making his
 “ adversary's claim to it, whatever that claim may
 “ be, conclusive of its own validity, and it cannot,
 “ therefore, make the tax deed conclusive evidence
 “ of the holder's title to the land.”

There seems to be no substantial difference between a statute confirming a past deed—declaring it valid and effectual—and one declaring that it shall be conclusive evidence that all things have been done necessary to make it valid and effectual.

The power of the Legislature to enact and change rules of evidence may be conceded. But if the Legislature cannot directly declare a void deed to be valid

it cannot accomplish that end under cover of a "rule of evidence." Such rules do not create or destroy rights, but relate only to the procedure by which existing rights are to be ascertained and enforced. A law which operates to transfer title to property from one person to another may possibly be a valid law, but it is not a rule of evidence. If any given law cannot be sustained for what it really is, it will not aid the matter any to cover it with a cloak and say, This a rule of evidence merely.

III.

Chapter 418 of 1885, considered as a statute of limitation, is unconstitutional and void when set up in favor of the State.

The act was passed in June, 1885. It allowed the land-owner whose land had been illegally sold for taxes six months after the passage of the act in which to institute legal proceedings to vacate the tax sale or deed.

It has been several times before the New York Court of Appeals, and we think it must be taken as settled, that it is a limitation law, and nothing else.

People vs. Turner (1889), 117 N. Y., 227.

People vs. Turner (1895), 145 N. Y., 451.

Ostrander vs. Darling (1891), 127 N. Y., 70.

Joslyn vs. Rockwell (1891), 128 N. Y., 354.

Joslyn vs. Pulver (1891), 59 Hun, 129, 135.

Turner vs. Boyce (1895), 11 Misc., 502.

In the first *Turner* case (117 N. Y., 227), RUGER, *C. J.*, says (p. 232):

"The act, in terms, purports to preserve all existing rights of taxpayers for the period of six

"months after the passage of the act, and to es-
 "tablish a rule of evidence to govern future con-
 "troversies, which made such deeds presump-
 "tive evidence of the regularity of the proceed-
 "ings upon which they were based, and after
 "two years from the recording, conclusive evidence
 "of the same matters. With reference to the six-
 "months provision, it operates, as to all existing
 "cases, as a limitation upon the taxpayer's right to
 "assert his claims under pre-existing laws, and, as
 "to all future cases, provides that the lapse of two
 "years from recording shall make that which was
 "before presumptive evidence only, conclusive
 "upon the rights of the parties. The act seems
 "to be, in its principal aspect, one of limitation,
 "and, as such, is within the constitutional power
 "of the Legislature to enact as affecting future
 "cases, and, we think, within settled rules, equally
 "within its power as to existing rights. It gives,
 "in all cases, a time for the person aggrieved to
 "establish his rights unaffected by the provisions
 "of the enactment; but provides that after the
 "lapse of a certain time the Comptroller's deed
 "shall be conclusive evidence of the regularity of
 "the proceedings upon which it is based."

In rendering the judgment now under review, GRAY,
J., says, with reference to the decision in the former
 case :

"It was held that the act, in its principal
 "aspect, was one of limitation, and that, as such,
 "it was within the constitutional power of the
 "Legislature to enact as affecting future cases and,
 "as well, existing rights (Record, p. 64; 145
 "N. Y., 457).

The validity of this law, as a statute of limitation,
 has been asserted by the New York Court of Appeals

in the two Turner cases above cited, the second of which is now here for review.

We are not unmindful of the reluctance of this Court to question the validity of State statutes which have been already passed upon and sustained by the State tribunals. But when a right is claimed under the Constitution of the United States, it is the duty of this Court to exercise an independent judgment.

Bradley *vs.* Fall Brook Irrigation District
(1896), 164 U. S., 112, 155.

The plaintiff denies the correctness of the decisions of the New York Court of Appeals and asserts that the statute in question, as a limitation law, is repugnant to the Fourteenth Amendment to the Federal Constitution, in that it deprives a citizen of his property without due process of law, because—

FIRST—*Any statute of limitation to be due process of law must afford some opportunity to the person to be affected by it to assert his rights before the bar falls; and this law did not afford any such opportunity as against the State.*

SECOND—*The owner of land in the full enjoyment of his own property cannot be compelled by legislation to sue for what he has already got under penalty of losing it.*

THIRD—*A statute of limitation, to be valid, must allow a reasonable length of time within which those rights can be enforced the assertion of which it is the object and purpose of the statute to limit.*

I. THERE WAS NO COURT OPEN DURING THE SIX MONTHS ALLOWED BY THE STATUTE IN WHICH NORTON OR THOSE WHO HAD SUCCEEDED TO HIS TITLE COULD HAVE ASSERTED THEIR RIGHT TO THE LAND IN QUESTION AS AGAINST THE STATE.

It is a general rule applicable to all statutes of limi-

tation that, to be operative, there must be not only a person to sue but a person to be sued.

Sanford vs. Sanford (1875), 62 N. Y., 553.

In *Cooley on Constitutional Limitations* (6th ed., 449) it is said :

"All statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity; if it should attempt to do so, it would be, not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions."

The statute in question conferred no new rights whatever on the land-owner. It provided that the tax sales and tax deeds which it was the object of the statute to validate should be subject to cancellation *"as now provided by law on a direct application to the Comptroller, or an action brought before a competent court therefor"*; and further, that the act itself should not affect any action, proceeding or application pending at the time of its passage, or begun within six months thereafter, for the purpose of vacating the tax sale.

It is a universal rule of our jurisprudence that a State cannot, without its own consent, be sued.

Kiersted vs. The State (1855), 1 Abb. Pr. (N. Y.), 385.

The People vs. Dennison (1881), 84 N. Y., 272, 282.

Locke vs. The State (1894), 140 N. Y., 480.

United States vs. Lee (1882), 106 U. S., 196.

Cunningham vs. Macon & Brunswick R. R. (1893), 109 U. S., 446.

Belknap vs. Schild (1895), 161 U. S., 19.
Troy & Greenfield R. R. vs. The Commonwealth (1879), 127 Mass., 43.

What action, proceeding or application could the owner of land illegally sold for taxes and bought in by the State have brought against the State?

Before what tribunal could Norton's heirs have summoned the State during the six months allowed by this law?

The only possible Courts were the following :

FIRST—*The ordinary Courts of Justice.*

SECOND—*The Comptroller of the State.*

THIRD—*The Board of Claims.*

(1) *The Ordinary Courts.*

To the ordinary Courts of Justice recourse plainly could not be had. The State has never consented to be sued therein.

Locke vs. The State (1894), 140 N. Y., 480.

The Act of 1885 itself does not give any such consent.

In *Turner vs. Boyce* (1895), 11 Misc., 502, 510, KELLOGG, J., says :

“No provision is made in this law or any other
 “by which any action or proceeding could be taken
 “against the State, and without the consent of the
 “State no such action or proceeding could be
 “taken.

* * * * *

“The right to take action or proceedings against
 “the State must be express, and does not arise by
 “implication (*Locke vs. The State* [1894], 140 N.

"Y., 480). It cannot be claimed that any such consent was given by the Act of 1885. Such a consent is not even hinted at in *People vs. Turner* (1889), 117 N. Y., 227."

It may, perhaps, be urged that even if the State itself could not have been sued, an action might have been maintained against some of its officers as trespassers, and the validity of the title claimed in its behalf, judicially determined, as was done in the *Arlington* case (106 U. S., 196).

There are several answers to this claim:

First—The Trial Court has found as a fact that no officer of the State ever took actual possession (Record, p. 50).

Second—Even if an officer of the State had been in actual possession, an action against him would have availed nothing, as the State would not have been bound by the judgment. Suppose the plaintiff or his predecessor in title had found some officer of the State in possession, and had sued and obtained judgment against him on the ground of the invalidity of the State's title, it would have been no defense to the present action.

Peck vs. The State (1893), 137 N. Y., 372.

Carr vs. United States (1878), 98 U. S., 433.

United States vs. Lee (1882), 106 U. S., 196, 222.

Third—The only remedy which would have been effectual to prevent the operation of the new statute of limitation was a suit or proceeding to cancel or annul the tax deed. The statute plainly contemplates that to avoid its effect the deed itself must be vacated or set aside. But such action, suit or proceeding could not have been maintained against the agent of the State alone. The State

itself would have been an indispensable party; and the State has never consented to be so sued.

Cunningham vs. Macon and Brunswick
R. R., 109 U. S., 446.

As against the finding of fact that no officer of the State ever took actual possession, it may be urged that the Forest Commission had actual possession as matter of law, and the judgment now under review cited to sustain it.

GRAY, *J.*, says (Record, p. 66; 145 N. Y., 460, 461):

"There may be considerable doubt with respect to the nature of the possession by Norton and of this appellant; but, however that may be, the State was constructively in possession through the Comptroller's purchase and deed. The effect was that the State had resumed its ownership of the land and its title thereto was assured, as the result of the proceedings, until invalidated by proof respecting the illegality of the proceedings leading to the tax sale. That title, by force of the provisions of the act of 1885, became unquestionable upon the expiration of the six months after it went into effect. While we think the People were not bound to take any steps towards actual possession, after the conveyance to them of the land, any doubt upon the subject would seem to be eliminated by virtue of the provision of the act which created the Forest Commission and placed the Forest Preserve, within which are the lands in question, in the care, control and supervision of the Commission. The constructive possession which the State had acquired, I think, was made an actual possession by the power and duties devolved upon the Forest Commission as its representative."

That an ordinary grantee under a void tax deed acquires a constructive possession of the land is contrary to what has been the settled law of the State for many years.

Johnson vs. Elwood (1873), 53 N. Y., 431.

Thompson vs. Burhans (1874), 61 N. Y., 52, 67, 68.

Thompson vs. Burhans (1879), 79 N. Y., 93.

To give to the Comptroller's deed to the State any other or different effect from that given to a similar deed to an individual is contrary to the statute, which is :

" Such purchases shall be subject to the same
 " right of redemption as purchases by individuals;
 " and if the land sold shall not be redeemed, the
 " comptroller shall execute a release therefor, to
 " the people of this state, or their assignees, which
 " shall have the same effect, and become absolute
 " in the same time, and on the performance of the
 " like conditions, as in the case of sales and convey-
 " ances to individuals."

Chap. 427, Laws of 1855, sec. 66. Appen-
 dix, p. 52.

To hold that the Forest Commission has anything at all to do with the lands in controversy is a complete begging of the question. That Commission is charged with the care and custody of the Forest Preserve. That Preserve was created in 1885 and is declared by the act creating it to consist of "all the lands now owned or which may hereafter be acquired by the state of New York within" certain counties, including Franklin.

Chapter 283 of Laws of 1885. Sec. 7 Ap-
 pendix, p. 90.

Before it can be held that the Forest Commission has anything whatever to do with any given parcel of land, it must first be determined that it is "owned" by the State.

We submit that actual possession must in the nature of things be a question of fact, and that the finding of the Trial Court against such possession by any officer of the State is conclusive.

But if the Court should be of opinion that the Court of Appeals has decided that the Forest Commission was put in actual possession of the land in controversy by force of the statute creating it, and that such decision is binding on this Court as regards the construction of the act, then we answer that the act itself is thereby made unconstitutional and repugnant, not only to the Constitution of the State of New York but also to that of the United States. If the Forest Commission was by the act in question put in actual possession of the land in question, then the true owner was thereby deprived of the possession which the law gave him, and as the act makes no provision for payment, property of the citizen was taken for a public use without just compensation, in violation of the Constitution of the State of New York (art. 1, sec. 6).

Possession of land is an estate in the land.

Mygatt vs. Coe (1894), 142 N. Y., 78, 87.

Mygatt vs. Coe (1895), 147 N. Y., 456.

It is, of course, essential to the full and complete enjoyment by the owner, but, independent of that consideration, the mere transfer of it from the owner to a stranger necessarily takes a part of what the owner had before the transfer. What the one gains the other must lose (see opinion of O'BRIEN, *J.*, in *Mygatt vs. Coe*, 147 N. Y., at p. 463).

If the actual appropriation of any part of the land of the citizen or the destruction or impairment of in-

tangible easements or appurtenances be a taking of property, as under the authorities it clearly is, it would seem to be too plain for argument that a statute which puts an agent of the State in the *actual*, and therefore in the *exclusive*, possession of land must necessarily be a taking of it. The true owner is thereby disseized and his estate in possession turned into a mere right of action.

The People vs. Otis (1882), 90 N. Y., 48, 52.
Story vs. N. Y. El. R. R. (1882), 90 N. Y., 122.

Forster vs. Scott (1893), 136 N. Y., 577, 584.
Eaton vs. B. C. & M. R. R. (1872), 51 N. H., 504.

The State cannot take possession of property, even in the open exercise of the right of eminent domain, without first providing a certain definite and adequate source and manner of payment.

Sweet vs. Rechel (1895), 159 U. S., 380.
Sage vs. City of Brooklyn (1882), 89 N. Y., 189.
Lewis on Eminent Domain, sec. 456.

So also as the Forest Commission Law (if given the effect claimed for it) ousted the owner from the possession of his own land without notice or an opportunity to be heard, it was not due process of law, and for that reason repugnant to both State and Federal Constitutions.

Stuart vs. Palmer (1878), 74 N. Y., 184.
Davidson vs. New Orleans (1877), 96 U. S., 97.
Scott vs. McNeal (1893), 154 U. S. 34.

In *People vs. Otis*, 90 N. Y., 48, an act which provided that the publication of a certain notice in regard to stolen bonds should operate to deprive those bonds of their

negotiable character, was held to violate both State and Federal Constitutions as to due process of law. ANDREWS, *C. J.*, says :

“ Depriving an owner of property of one of its
 “ essential attributes is depriving him of his property
 “ within the constitutional provision, and a legisla-
 “ tive declaration that upon the publication of notice
 “ a negotiable security shall no longer be transferable
 “ is not due process of law, working a forfeiture of
 “ the right given by the contract.”

In *Forster vs. Scott* (1893), 136 N. Y., 577, O'BRIEN, *J.*, says :

“ Whenever a law deprives the owner of the
 “ beneficial use and free enjoyment of his property
 “ or imposes restraints upon such use and enjoyment
 “ that materially affect its value without legal process
 “ or compensation, it deprives him of his property
 “ within the meaning of the Constitution. All that
 “ is beneficial in property arises from its use and the
 “ fruits of that use, and whatever deprives a person of
 “ them deprives him of all that is desirable in the title
 “ and possession.”

An act of the Legislature which puts an adverse claimant of land into *actual possession* thereof deprives the true owner of all present enjoyment and beneficial use ; it deprives him of the right to sell and convey the land, and when, as in the present case, the claimant so legislated into possession is exempt from the usual process of the courts, lapse of time will in effect divest his title and destroy his right. Legislation which so operates differs from confiscation only in name.

In no aspect of the case did the Forest Commission have actual possession.

In no form of action, therefore, could the title of the

State have been tried and decided by the ordinary courts of justice.

(2) *Jurisdiction of the Comptroller to cancel.*

The Act of 1855 and the earlier laws, under which tax sales were made authorized the Comptroller to cancel all illegal sales (chap. 427, Laws of 1855, secs. 83, 85. Appendix, pp. 57, 58). The act in question of 1885 did not attempt to confer such power, but assumed it to be already in existence.

Shortly after the passage of the act of 1885 the Court of Appeals decided that the power of the Comptroller to cancel an illegal sale could only be invoked by the purchaser at the tax sale, and that the owner of the land illegally sold was not entitled to ask for a cancellation. This ruling was adhered to by the Court of Appeals in spite of changes in the statute intended by the Legislature to give to the land-owner the privilege which had been denied by the Court, so that *prior to the judgment now under review* it was deemed finally settled that the Comptroller had no power to cancel an illegal tax sale on the application of the owner whose land had been sold.

People ex rel. Wright vs. Chapin (1887),
104 N. Y., 369.

*People ex rel. Equitable Life Assurance
Society vs. Chapin* (1887), 105 N. Y.,
629.

Ostrander vs. Darling (1891), 127 N. Y.,
70.

Joslyn vs. Pulver (1891), 59 Hun, 129, 135.

*People ex rel. Hamilton Park Co. vs.
Wemple* (1893), 139 N. Y., 240.

People ex rel. Witte vs. Roberts (1894),
144 N. Y., 234.

Turner vs. Boyce, 11 Misc. (1895), 502.

But in rendering the judgment now under review, GRAY, J., uses this language (Record, p. 66; 145 N. Y., 460):

“Conceding the irregularity in the assessment proceedings to have been such as rendered the sale invalid, nevertheless the assessors had the jurisdiction and authority to assess, and if they erred in their proceedings, and neglected to take the steps which the statute required, there was, in the first place, the remedy of an appeal to the Board of Supervisors; and, in the second place, there was the opportunity to appear before the Comptroller. By virtue of the Act of 1885, that opportunity to appear before the Comptroller and to demand the cancellation of the tax sale, because of irregularities in the proceedings leading to the sale, was continued for six months after the passage of the act. Differing from a case between the owner of lands and the purchaser thereof at the tax sale, where the Comptroller would not have the power upon the application of the owner to cancel a tax title, here the State became the owner through the purchase, and it was open to the owner to come before the Comptroller and to make proof of the invalidity of the sale through which the State derived its title. With the knowledge of the law, the person claiming to be the owner of the land sold was chargeable; and when put upon his inquiry as to the result of the proceedings, he discovered the State to have become the purchaser, it was incumbent upon him to take affirmative steps to cancel the sale, if he would recover his title to the lands.”

If it had been intended by the Court of Appeals to overrule, limit or distinguish all its former decisions,

it is a little singular that no reference whatever was made to them.

The power of cancellation which Judge Gray speaks of as "continued for six months" by the Act of 1885 is declared in the act itself to be "as now provided by law;" and in the *Wright* case (104 N. Y., 369, 376) when, on the motion for re-argument, the Act of 1885 was pressed upon the Court, it was said in reply by Danforth, J.: "It gives no new power."

In the case of *The People ex rel. The Equitable Life Assurance Society vs. Chapin* (1886), 39 Hun, 230; 103 N. Y., 635; 105 N. Y., 629, the precise point was raised and decided. That was an application made by the relator as mortgagee of certain lands which had been sold to the State at the tax sales of 1877 and 1881. The application was made to the Comptroller on November 20, 1885, and during the six months following the passage of chapter 448 of 1885; in other words, within the time during which, according to the opinion of Judge Gray, the right "to demand" a cancellation from the Comptroller was continued. It was denied by the Comptroller. Upon the appeal to the Court of Appeals, the then Attorney General insisted that the Comptroller had no power to cancel a tax sale of land to the State, and further insisted that the case was controlled by *Wright vs. Chapin*, his printed brief upon the latter point being in these words:

"The question of the right of the relator to demand a cancellation at the hands of the Comptroller has been fully considered by this Court (see opinion of Danforth, J., in case of *People ex rel. Wright vs. Chapin* [1884], 4 Eastern Rep., 305).

"The principle of *stare decisis* may therefore be invoked by the Comptroller in this case."

The Court concurred in this view and affirmed the order of the Comptroller, "on the authority of *People*

"ex rel. *Wright vs. Chapin*, 104 N. Y., 369" (see 105 N. Y., 629).

[The case of *The Equitable Life vs. Chapin* not being fully reported, we have printed the record as it was before the Court of Appeals in full in the Appendix to this brief; p. 106.]

The question has been again very recently before the New York courts. In *People ex rel. Millard vs. Roberts* (1897), 8 App. Div., 219, affirmed in 151 N. Y., 540 (Appendix, p. 137), it was squarely decided that the Comptroller had no power to cancel an illegal tax sale at which the State had become the purchaser, and O'BRIEN, J., says (p. 543):

"The objections which have been so often stated to the exercise of this jurisdiction, at the instance of the owner, still remain good" (citing above cases). * * *

"It is obvious that there was no intention to modify or disturb these decisions by anything that was said in the case of *People vs. Turner* (117 N. Y., 227; 145 N. Y., 451)".

We think, in view of this last decision of the Court of Appeals, that the controversy as to the power of the Comptroller to cancel an illegal tax sale on the application of the purchaser, is closed. It must be now taken as settled law that such power does not and never did exist.

(3) *Jurisdiction of the Board of Claims.*

The only permission which the Legislature has ever given to sue the State is to be found in the statutes relating to the Canal Appraisers, the Board of Audit and the Board of Claims. Chapter 321 of the Laws of 1870 gave the Canal Appraisers jurisdiction to hear and determine all claims against the State growing out of the use and management of the canals, and to award such sum as shall be just and equitable (Appendix, pp. 95, 96).

The Board of Audit was created by chapter 444 of the Laws of 1876, and authorized to hear "all private claims and accounts against the State" (except those then heard by the Canal Appraisers), "and to allow such sums as it shall consider should equitably be paid by the State to the claimants" (Appendix, pp. 96, 97).

The Board of Claims was created by chapter 205 of the Laws of 1883, as amended by chapter 60 of Laws of 1884. The office of Canal Appraisers and the Board of Audit were abolished, the power possessed by them being transferred to the new Board. The jurisdiction given is to hear, *audit* and determine "all private claims against the State * * * and to allow thereon such sums as should be paid by the State" (sec. 7). The award which the Board is authorized to make "shall contain * * * the amount allowed the claimant, if any" (sec. 8). (Appendix, p. 102).

This Act of 1883 seems to have been the only one in force in 1885 by which the State had to any extent authorized itself to be sued. Did it authorize the Board of Claims to vacate a tax sale and deed to the State or to try the title of the State to land?

Statutes allowing the State to be sued are strictly construed in favor of the exemption of the State, and no suit can be maintained unless the consent to bring it has been clearly and expressly manifested.

Locke vs. The State (1894), 140 N. Y., 480.

Belknap vs. Schild (1895), 161 U. S., 10.

Troy and Greenfield R. R. vs. The Commonwealth (1879), 127 Mass., 43.

Murdock Grate Co. vs. Commonwealth (1890), 152 Mass., 28.

The jurisdiction of the Board of Claims is, we think, confined to claims for money only and does not include those for the recovery of specific, real or personal prop-

perty ; neither can it give judgment against the State for purely equitable relief.

(1) The jurisdiction is to "audit." This can only apply to money claims.

(2) It is "to allow such sums as should be paid." This also clearly contemplates a money demand.

(3) The award of the Board must state the sum allowed. This cannot be done if specific property is in question.

(4) The right of appeal depends on the number of "dollars" in controversy.

It is true that the words "all private claims against the State" are broad and sweeping, and standing alone might be sufficient to give general jurisdiction of all causes of action whatsoever. But they do not stand alone and they are controlled by the other provisions of the statute which refer to money demands only.

The statutes relating to the Federal Court of Claims seem to be so far similar to the Act of 1883 in regard to the Board of Claims, that the construction given to it by this Court may be fairly cited as bearing on the proper construction of the New York law.

The first act was that of 1855 (10 St. at Large, 612). It gave jurisdiction "to hear and determine all claims founded upon any law of Congress * * * or upon any contract, express or implied, with the Government of the United States."

In 1863 the Court was reorganized (12 Stat. at Large, 765). The language as to jurisdiction remained unchanged. Appeals from its judgments were authorized *where the amount in controversy exceeded \$3,000* ; if the judgment was affirmed the *sum due* was to be paid, *with interest*.

In *United States vs. Alire* (1867), 6 Wall., 573, it was held that the jurisdiction given by these statutes was limited to claims for money only.

NELSON, J., says (p. 575):

“It will be seen by reference to the two acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the Government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the Government to the petitioner. And, although it is true that the subject-matter over which jurisdiction is conferred, both in the Act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the Government.”

In *Langford vs. United States* (1879), 101 U. S., 341, officers of the United States took possession of certain land, claiming the same as the property of the United States. The plaintiff, claiming himself to be the true owner, brought suit in the Court of Claims. It was held by this Court that the claim, being founded on a tort, was not within the jurisdiction of the Court of Claims.

In 1887 a new act was passed entitled, “An act to provide for the bringing of suits against the Government of the United States” (24 Stat. at Large, 505).

The first section is as follows:

“The Court of Claims shall have jurisdiction to hear and determine the following matters:

“*First*—All claims founded upon the Constitution of the United States or any law of Congress,

“ except for pensions, or upon any regulation of
 “ an Executive Department, or upon any contract,
 “ expressed or implied, with the Government of
 “ the United States, or for damages, liquidated or
 “ unliquidated, in cases not sounding in tort, in
 “ respect of which claims the party would be en-
 “ titled to redress against the United States, either
 “ in a court of law, equity, or admiralty, if the
 “ United States were suable.”

Concurrent jurisdiction as to all matters named in the first section was given to the Circuit and District Courts, with some limitations as to the amount.

In *United States vs. Jones* (1888), 131 U. S., 1, the extent of the jurisdiction conferred by this statute was before this Court. The suit was begun in a Circuit Court, and was a bill in equity against the United States to compel the issue and delivery to the plaintiff of a patent for land claimed to have been taken up and purchased by the plaintiff under and in accordance with an act of Congress.

The United States demurred to the bill. The demurrer was overruled and the United States appealed.

The claim was plainly within the letter of the law. It was founded on a law of Congress and a contract with the United States, and the claimant having paid for the land, as the demurrer of course admitted, was entitled to equitable relief.

The case was elaborately argued in support of the claim, and the Court was strongly urged to amplify jurisdiction in the interests of justice.

BRADLEY, *J.*, says (pp. 15-17) :

“ It is argued that the new law has extended the
 “ jurisdiction of the Court of Claims and the con-
 “ current jurisdiction of the Circuit and District
 “ Courts, or at least the latter, so as to embrace

“every kind of claim, equitable as well as legal,
 “and specific relief, or a recovery of property, as
 “well as a recovery of money. * * *

“The jurisdiction here given to the Court of
 “Claims is precisely the same as that given in the
 “acts of 1855 and 1863, with the addition that it is
 “extended to ‘damages * * * in cases not
 “‘sounding in tort,’ and to claims for which re-
 “dress may be had ‘either in a court of law, equity,
 “‘or admiralty,’ * * * . ‘Claims, redressible
 “‘in a court of law, equity, or admiralty,’ may be
 “claims for money only, or they may be claims for
 “property or specific relief, according as the con-
 “text of the statute may require or allow.”

Then, after showing that the provisions of the former statutes as to appeals, as to paying the judgments and as to interest upon them, which had been relied on in *U. S. vs. Alire* (1867), 6 Wall., 573, to limit jurisdiction to money demands, were still in force, he proceeds (p. 18):

“It seems, therefore, that in the point of provid-
 “ing only for money decrees and money judg-
 “ments, the law is unchanged, merely being so
 “extended as to include claims for money arising
 “out of equitable and maritime as well as legal
 “demands. We do not think that it was the in-
 “tention of Congress to go farther than this. Had
 “it been, some provision would have been made
 “for carrying into execution decrees for specific
 “performance, or for delivering the possession of
 “property recovered in kind.”

The language of the United States statute is cer-
 tainly as broad as that of the New York statute of
 1883. What cause of action is conceivable which is
 not a claim redressible in a court of law, equity or ad-
 miralty? The New York statute contains clauses sub-

stantially similar to those which in the Federal law were held to restrict the sweeping language in which jurisdiction was granted to claims for money only. The thing which may be allowed is a "sum" to be "paid." The language of the judgment or award must express "the amount" allowed. Appeals depend upon the number of "dollars" in controversy.

If these provisions of the statute do not limit the grant of jurisdiction to money claims, then the words, "all private claims," must be held to embrace all causes of action, and the State is suable generally.

That such is not the legislative understanding of the act is evident from the number of special acts passed at every session of the Legislature giving the Board jurisdiction over particular claims (see, *e. g.*, chap. 938 of Laws of 1896, and seventeen other similar acts passed at the same session). All these are unnecessary if the Act of 1883 give general jurisdiction of "all claims against the State."

Further than this, the awards of the Board of Claims are recommendatory merely, and amount to nothing unless the Legislature sees fit to carry them into effect.

The Constitution of the State provides:

"The legislature shall neither audit nor allow any
"private claim or account against the state, but
"may appropriate money to pay such claims as shall
"have been audited and allowed according to law"
(art. 3, sec. 19).

See also sec. 6 of Board of Claims Act (Appendix, p. 101).

If the decision of that board be in *favor* of the State, it is declared to be final and conclusive, though even then if money be found due the State, on a counter claim, an action must be brought on the award in the ordinary courts to collect it (sec. 9; Appendix, p. 102). Awards *against* the State are not made

final and cannot of themselves be enforced. The board is more like a committee of the Legislature than a court of justice. Presenting a claim to it is, in effect, presenting a petition to the Legislature, which it may grant or refuse as a majority pleases. If the land-owner was entitled to an opportunity not only to assert but to enforce his right before such right could be lawfully destroyed by a limitation law, then we say that such opportunity was not given by any of the statutes creating the Board of Claims, and any remedy sought in that tribunal would have been wholly illusory.

Railroad Co. *vs.* Tennessee (1879), 101 U. S., 337.

Railroad Co. *vs.* Alabama (1879), 101 U. S., 832.

Baltzer *vs.* North Carolina (1895), 161 U. S., 240.

We say, therefore, that there was no Court open during the running of the six months allowed by the Law of 1885 in which the land-owner could have asserted and enforced his rights against the State. It follows that the statute was inoperative as against him. Statutes of limitation in general do not run against the citizen in favor of the State.

Parmenter *vs.* The State (1892), 135 N. Y., 154-163.

Baxter *vs.* State of Wisconsin (1860), 10 Wis., 454, 458.

Turner *vs.* Boyce (1895), 11 Misc., 502.

In the *Parmenter* case PECKHAM, *J.*, says (p. 163):

“ The counsel for the State concedes what would
 “ also seem quite plain, that if there never had
 “ been any tribunal created by the State before
 “ which the claimant could have pressed his claim,
 “ the statute of limitations would not have com-

“menced to run, because it would have been absurd to hold there was a statute of limitations, within which a claim must be sued when there had been neither a person to be sued, nor any court or tribunal before which the State could be summoned to answer the suit.”

It follows as a general proposition that the State can never acquire title by adverse possession, except, perhaps, in cases in which an officer or agent of the State is in actual possession and liable to suit.

Stanley vs. Schwalby (1893), 147 U. S., 508.

San Francisco Savings Union vs. Irwin (1886), 28 Fed. Rep., 708.

In *Stanley vs. Schwalby*, 147 U. S., 508, the United States defended possession of its military reservation at San Antonio under the limitation laws of Texas, because its officer had been in actual possession and, under the rule in the *Arlington Case* (U. S. *vs. Lee*, 106 U. S., 196), liable to suit during the time limited, FULLER, C. J., saying (p. 519):

“Although not bound by statutes of limitation, the United States, as we have seen, were entitled to take the benefit of them, and inasmuch as an action could have been brought at any time after adverse possession was taken, against the agents of the Government through whom that was done and by whom it was retained, the objection cannot be raised against them that the statute could not run because of inability to sue.”

In *San Francisco Savings Union vs. Irwin* [1885] (28 Fed. Rep., 708), FIELD, J., says (p. 715):

“We doubt very much whether the United States can acquire title by adverse possession against the right of a private citizen. The theory that an

" open and uninterrupted possession of land by a
 " party, not being the real owner, may ripen into
 " title, is founded upon the supposed acquiescence
 " of the owner in the claim of the occupant by his
 " not entering upon the property, or taking legal
 " proceedings to recover its possession. Statutes
 " of limitation do not run against the United States
 " except when expressly provided by Congress, and
 " no action will lie against them by a private citi-
 " zen except by their consent. Legal proceedings
 " to enforce the claim of a citizen to lands in pos-
 " session of the United States could not, there-
 " fore, be taken, and no statutes can run against
 " one to whom the courts are closed for the
 " maintenance of his claim. Nor could the citizen
 " assert his claim to such lands by entering upon
 " them. There can be no private entry upon land
 " for the assertion of one's rights, where the law
 " does not allow an action against the occupant for
 " the possession."

The New York Code, section 367, provides that an
 entry on lands shall be of no avail unless followed by
 an action within one year.

II. THE OWNER OF LAND IN THE FULL ENJOYMENT OF HIS
 PROPERTY CANNOT BE COMPELLED BY LEGISLATION TO SUE FOR
 WHAT HE HAS ALREADY GOT UNDER PENALTY OF LOSING IT.

We contend that the statute is not valid as against
 an owner who at the time his land was sold, and at the
 time of the passage of the act, was in possession, actual
 or constructive, of his own land.

The land was sold to the State in 1877 and the deed
 executed and recorded in 1881.

The law now in question was passed in June, 1885,
 and the six-months limitation expired in December,
 1885.

It has been found as a fact in the present case that the State never took possession, so that while the limitation was running, the land was in fact vacant (Record, p. 10, Findings VI. and X.).

The question then relates to a statute which operates, if at all, to perfect the title of a tax purchaser who has never taken or acquired actual possession of the land. Can a tax purchaser who got nothing by his deed alone keep silence until such a statute has run and then eject the former owner?

In *Joslyn vs. Rockwell* (1891), 128 N. Y., 334, 339, the Act of 1885 we are now considering was before the Court of Appeals, and its validity challenged as against the owner in possession of his land. The question, however, was not decided, PECKHAM, J., saying (p. 339):

"There is very weighty authority for holding
 "such a statute in the case of one in possession to
 "be invalid (Cooley, Con. Lim. [3d ed.], 366, and
 "cases cited in note 1). We leave the matter with-
 "out expressing an opinion in regard to it."

Limitation laws are statutes of repose (Story, J., in *Bell vs. Morrison* [1828], 1 Pet., 351, 360). They proceed on the theory that when the existing state of thing has continued for a certain time it shall not thereafter be disturbed. When the statute has run, the position of the parties is precisely what it was before. It changes nothing; on the contrary, it prohibits change. They operate, and must operate, in favor of possession, and never against it. Such a statute is a weapon of defense only—a shield and not a sword.

Morey vs. Farmers' Loan and Trust Co.
 (1856), 14 N. Y., 302, 309.

A person who has a right and fails to enforce it within the time fixed by law may well be held to have forfeited that right.

Cooley, Const. Lim., 6th ed., p. 449.

But how can that theory apply to the case of an owner in possession? Take the present case. At the time of the tax sale of 1877, Norton was owner. It has long been the settled law of this State that possession of vacant land follows in the wake of the legal title. Norton was, therefore, in possession.

Bliss vs. Johnson (1883), 94 N. Y., 235, 242.

U. S. vs. Arredondo (1832), 6 Pet., 691, 743.

The Trial Court has so found (Record, p. 51).

And such constructive possession was not divested by the illegal tax sale.

Johnson vs. Elwood (1873), 53 N. Y., 431, 434.

Thompson vs. Burhans (1874), 61 N. Y., 52, 67.

People ex rel. Millard vs. Roberts (1896), 8 App. Div., 219, 222.

Gomer vs. Chaffee (1882), 6 Col., 314, 316.

Patton vs. Luther (1877), 47 Iowa, 236.

What cause of action accrued to him by reason of the tax sale? What could he sue for? The title? He had it already. Possession? That also was his. What was there that the law could give him?

As long ago as the time of Lord Coke it was ruled :

"That no fine nor warranty shall bar any estate
"in possession, reversion, or remainder, which is
"not divested and put to a right; for he who has
"the estate or interest in him cannot be put to his
"action, entry, or claim, for he has *that* which the
"action, entry or claim would vest in, or give him."

Podger's case, Coke Rep., Pt. IX., p. 106.

It may be said that he could have sued to cancel the sale as a cloud on title. Assuming that such an action

could have been maintained, what need was there for it? The sale was void. He knew it was void. He knew that he could defend himself whenever attacked. Why should he take the burden of the assault? Ordinary statutes of limitation may no doubt apply to ordinary suits to cancel a cloud on title; but was it ever asserted that the omission for ten years to scatter the "cloud" operated to divest the true owner of his title? Has it ever been held that the "shadow" of title cast by a "cloud" becomes real and substantial by mere lapse of time? Unless, then, there was something for which Norton or his heirs could have sued, there was no action to limit, no right to bar.

If the tax sale of 1877, the deed based on it in 1881, and the statute of 1885 were together sufficient to vest title in the State, when was it done? In all cases of the transfer of title to land, there is a moment of time at which it can be said the title passes. In ordinary cases it is at the delivery of the deed. But in the present case the deed itself did not so operate, for it was void when it was made. If it be said that the title passed when the Act of 1885 was enacted, or when the six months expired, then in either case the transfer of title was by legislative *fiat*.

All this is very different in a case where the holder of the formal but void tax deed enters upon the land claiming the title and clothes himself with possession.

He thereby disseizes the true owner and does in law acquire the estate. He is from that moment a freeholder—seized in fee of the land.

"Disseizin is the privation of seizin. It takes
 "the seizin or estate from one man, and places it
 "in another. It is an ouster of the rightful owner
 "from the seizin. It is the commencement of a
 "new title, producing that change by which the
 "estate is taken from the rightful owner, and
 "placed in the wrongdoer. Immediately after a

“ disseizin the person by whom the disseizin is
 “ committed, and who is called the disseizor, has
 “ the seizin or estate ; and the person on whom this
 “ injury is committed has merely the right or title
 “ of entry.”

2 Preston, Abstracts of Title, p. 284.

The disseizor has an estate of inheritance, and if he die in possession the law casts both that estate and the possession on his heir.

Washburn, Real Property, 5th ed., vol. 3,
 p. 140 (*487).

The rights of the true owner, the disseizee, rest in action only. He cannot devise the land (*Goodright vs. Forrester* [1807], 8 East, 552, 566); neither can he convey it without regaining seizin, because a right of action was not by the common law transferable.

“ After an *actual disseizin* the disseizee could
 “ not devise or dispose of the lands, inasmuch as
 “ his interest was by the disseizin cut down to a
 “ right of entry which the policy of the old law
 “ against maintenance would not allow him to de-
 “ part with ; and, further, if a descent was cast
 “ after a year, he lost his right of entry, and was
 “ put to his real action in order to reinstate him-
 “ self.”

2 Smith's Leading Cases,* p. 397 (8th ed.,
 p. 705), Note to *Taylor vs. Horde*.

See also 2 Preston, Abstracts of Title,
 p. 389.

He is in a position where he must enforce his rights or he may lose them. *His* case is manifestly one which is the proper subject of limitation, and when the time fixed has expired the *title*, which vested in the disseizor immediately on his entry, but which has been defeasible during the running of the statute, becomes perfect

and indefeasible, not by reason of any change in the character of that title—for that has been a freehold of inheritance (though wrongful) from the beginning—but because the right of action of the true owner is barred.

Baker vs. Oakwood (1890), 123 N. Y., 16.

In *Angell on Limitations* (6th ed., p. 397, sec. 390), it is said, quoting from *Abell vs. Harris* (1841), 11 Gill & J., 371 :

“The principle on which the statute of limitations is predicated is not that the party in whose favor it is invoked has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered ; a mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted, and consequently his rights are unaffected by the statute.”

In *Cooley on Constitutional Limitations* (6th ed., p. 449 and note 3), it is said :

“All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law. Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession ; but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the va-

"lidity of a claim which the latter asserts, but
"takes no steps to enforce."

The author adds, in a note (note 3) :

"This circumstance of possession or want of
"possession in the person whose right is to be ex-
"tinguished seems to us of vital importance. How
"can a man justly be held guilty of laches in not
"asserting claims to property, when he already
"possesses and enjoys the property? The old
"maxim is, 'That which was originally void can-
"not by mere lapse of time be made valid;' and
"if a void claim by force of an act of limitation
"can ripen into a conclusive title as against the
"owner in possession, the policy underlying that
"species of legislation must be something beyond
"what has been generally supposed."

In *Joslyn vs. Pulver* (1891), 59 HUD, 129, LONDON, J.,
says, with reference to the statute we are now consid-
ering (p. 135):

"The proper office of a statute of limitations is
"to put an end to claims which are not asserted
"within a reasonable time, not to put an end to
"defenses to such claims. Time is one of the
"muniments of the possessor's title and the de-
"stroyer of the non-possessor's claim. We do not
"think the rule should be reversed so as to make
"the claim stronger as it becomes staler. Limita-
"tion laws cannot compel a resort to legal pro-
"ceedings by one who is already in the complete
"enjoyment of all he claims."

See also *Turner vs. Boyce* (1895), 11
Misc., 502, 509.

Similar questions have arisen in other States.

The Michigan Tax Law made a deed which had been
on record for two years, except in certain cases, where

it had been annulled by the courts, conclusive evidence in favor of the tax purchaser (Laws of 1853, chap. 86, sec. 124, as amended by Laws of 1858, p. 190).

Another section of the same act dealt with purchases by the State at tax sales, and declared that after the lapse of five years the title of the State should be absolute and no action should be maintained to question it (Laws of 1858, p. 192, amending sec. 135 of the Act of 1853). During the five years authority was given to sue the Auditor-General (Act of 1853, chap. 86, sec. 133, as amended by Laws of 1858, p. 192).

In *Quinton vs. Rogers* (1863), 12 Mich., 168, the section making the deed conclusive in favor of the tax purchaser, after being on record two years, was held unconstitutional and void, but on the ground that no remedy had been provided for the land-owner, the attempt of the Legislature in that direction having been overthrown by the Court as unconstitutional.

In *Groesbeck vs. Seeley* (1865), 13 Mich., 329, the validity of the five-years clause was considered. The land had been sold to the State in 1858, held by the State for more than five years, and then conveyed through *mesne* conveyances to Seeley, who brought ejectment. The defendant offered to show that the tax sale was irregular, illegal and void. The Court rejected the evidence, and a verdict was rendered for Seeley.

CAMPBELL, J., said (p. 342):

"The defendants below offered to show that the
 "taxes for which the lands were sold were illegal
 "for non-compliance with the statutes. The Court
 "refused to permit this, on the ground that, by
 "section 135 of the tax law, the title to land bid
 "off by the State is made absolute and indefeasi-
 "ble after five years, and no adverse title can be
 "allowed to be set up against it, either by a plain-
 "tiff or by a defendant. Such is plainly the pro-

“ vision of the statute, and the only question,
 “ therefore, is, whether such a law can be main-
 “ tained.

“ This point is substantially like that which
 “ arose in *Quinton vs. Rogers*. In that case a stat-
 “ ute cutting off all adverse rights two years after
 “ a deed had been recorded, was held invalid, on
 “ the ground that it was depriving a party of his
 “ rights without due process of law. * * *
 “ There is no principle on which such legislation
 “ can be maintained. The only manner in which
 “ a party holding a lawful and vested right in
 “ property can be prevented from asserting it
 “ against one which was not lawful in its inception,
 “ is by the operation of limitation laws. These
 “ laws do not purport to take away existing rights,
 “ although their operation may often have substan-
 “ tially that result. But they are designed to
 “ compel parties whose rights are unjustly with-
 “ held from them to vindicate their claims within
 “ some reasonable time. If a person who has
 “ been ousted of his possession or dominion de-
 “ sires to regain it, he knows that he must resort
 “ to those means which are furnished by the law,
 “ either by the peaceable act of a party himself, or
 “ by legal prosecution. A limitation law simply
 “ requires him to proceed and enforce these rights
 “ within some reasonable time, on pain of being
 “ deemed to have abandoned them. Such laws
 “ can only operate on those who are not already
 “ in the enjoyment and dominion of their rights.
 “ A person who has a lawful right, and is actually
 “ or constructively in possession, can never be
 “ required to take active steps against opposing
 “ claims. The law does not compel any man who
 “ is unassailed to pay any attention to unlawful
 “ pretenses which are not asserted by possession

" or suit. When such a title is set up, he has a
 " right to defend himself, by jury, if the claim is
 " one of common law cognizance, or otherwise, if
 " of a different nature. But to hold that, under
 " any circumstances, a man can be deprived of a
 " legal title without a hearing, is impossible, with-
 " out destroying the entire foundations of consti-
 " tutional protection to property. No one can be
 " cut off by limitation until he has failed to prose-
 " cute the remedy limited ; and no one can be com-
 " pelled to prosecute, when he is already in pos-
 " session of all that he demands.

" This statute does not purport to be a limita-
 " tion law. It is designed by its express terms to
 " deprive persons of their titles, whether in pos-
 " session or not, by mere lapse of time. If the
 " proceedings to sell for taxes were illegal, no
 " lapse of time can change their character, and
 " they can never, therefore, become legal. If
 " the tax purchaser obtains possession, and holds
 " it until protected by a limitation law, he then
 " becomes safe, not because his tax title is any
 " more regular, but because the holder of the
 " better title has become incapable of asserting it.
 " As an illegal tax title is a nullity, it cannot of
 " itself divest or affect the true title in any way, and
 " the true owner cannot be lawfully compelled to
 " incur expense or take active measures to get rid
 " of it, unless he sees fit. But if he become ousted,
 " whether by a pretended tax title holder or by
 " any adverse claimant, he can only secure the en-
 " joyment of his rights by active measures, and
 " the party in possession may then rely on such
 " possession until it is lawfully assailed, by suit, or
 " otherwise, within the period of limitation. In
 " the present case, the party asserting a legal claim,
 " against one which he claims to have been illegal,

“is in possession as a defendant. The other claimant is the actor, and insists that, whether his tax title was legal or worthless originally, it has become good, although the defendant has not been previously ousted and guilty of delay in enforcing this title. If this tax title can be thus made indefeasible against a title in possession, by mere lapse of time, it might as well have been declared so originally. It would in either case be nothing more nor less than depriving one of his property without any legal process, and is simply confiscation by ministerial and not judicial action.”

In *Case vs. Dean* (1867), 16 Mich., 12, the question arose again under the two-year section of the statute, but the position of the parties was reversed. The plaintiff was the original owner and the defendant was the tax purchaser under a deed which had been recorded more than two years.

CHRISTIANCY, *J.* (after holding that the two-year limitation had been held void in *Quinton vs. Rogers*), says (p. 21):

“It is insisted by the plaintiff in error (defendant below) that he was in the present case in possession under his tax deeds claiming title during the two years prior to the institution of the suit; and that the real ground for holding the limitation void in *Quinton vs. Rogers* was that the original owner being in possession and in the full enjoyment of all he could obtain by suit, the effect of the statute, if allowed to operate, would be to divest him of his property without trial or legal process, as held in *Groesbeck vs. Sedey* (13 Mich., 329) with respect to the attempted limitation of five years under the 135th section of this act (of 1858); that the defendant below being in

“ possession, and the original owners out of possession, the case does not come within the principle of the decisions cited, and that the statute in this case may have its *legitimate effect* as a statute of *limitation* without conflicting with the Constitution or the decisions referred to.”

Then, after showing that the facts proved were not sufficient to constitute possession on the part of the tax purchaser, it is held that the case falls within the principle of the former decisions.

In Minnesota, a statute of March 11, 1862 (Laws of 1862, chap. 4), was as follows :

“ Sec. 7. That any person or persons having or claiming any right, title or interest in or to any land or premises after a sale under the provisions of this act adverse to the title or claim of the purchaser at any such tax sale, his heirs or assigns, shall, within one year from the time of the recording of the tax deed for such premises, commence an action for the purpose of testing the validity of such sale, or be forever barred in the premises.”

In *Baker vs. Kelley* (1866), 11 Minn., 480, this statute came up for construction. The action was ejectment by the original owner against the tax purchaser. Evidence to show the invalidity of the tax sale was rejected by the Trial Court, because the action had not been begun within the time limited by the statute, and plaintiff appealed.

WILSON, *Ch. J.*, said (p. 495) :

“ Suppose it is intended by this law to require the original owner to commence an action within the time fixed or be forever barred from testing or questioning the validity of the assessment or sale? Is such a law sanctioned by the Constitu-

"tion? We have seen that this law is intended to
 "operate mostly, if not exclusively, on owners or
 "claimants in possession, and that if intended as
 "a limitation of the time within which ejectment
 "may be brought, it is void. It may be admitted
 "that it is competent for the Legislature to limit
 "the time within which a party in possession may
 "commence an action under our statutes to remove
 "a cloud from his title, or silence an adverse claim;
 "but that it may require him to bring such action
 "as a condition to the enjoyment of his property
 "in the enforcement or defense of his rights is
 "quite a different thing. It is not necessary for a
 "party in the enjoyment of his rights to institute
 "any proceedings against an adverse claimant, and
 "to require him to do so would be, in many cases,
 "imposing a grievous and expensive burden. A
 "law requiring a party to take such action is not,
 "nor has it, any analogy to a statute of limitation.
 "Statutes of limitation only operate as an extin-
 "guishment of a remedy, and, of course, can have
 "no application to a party who neither seeks nor
 "needs a remedy."

In *Hill vs. Lund* (1868), 13 Minn., 451, the question
 again arose with reference to the Act of 1862. The
 suit was brought by the owner in possession to cancel
 a tax deed as a cloud on title, but the action was held
 barred.

BERRY, J., says (p. 453):

"The application of the limitation to the present
 "action does not deprive the plaintiff of his right
 "of property or possession in the premises pur-
 "porting to be conveyed by the tax deed.

"The denial of permission to the plaintiff to
 "bring an action for the purpose of adjudging the

“ tax deed void, as a cloud upon his title, does not
“ make the cloud substantial.”

The Act of 1862 was soon repealed. In 1881 an act was passed for the enforcement of delinquent taxes by judgment and sale and it was enacted that the judgment and sale provided for “ shall not be set aside unless the action in which the validity of the judgment or sale shall be called into question, or the defense to any action alleging its invalidity, be brought within nine months of the date of said sale” (Gen. Laws of Minn., 1881, ch. 135, sec. 7).

In *Feller vs. Clark* (1887), 36 Minn., 338, this statute was held void. The action was brought by the original owner to quiet title. The defendant set up a tax title, and on that title based a counter-claim and asked that he be adjudged the true owner. The land was vacant and the suit was not brought until more than nine months after the trial. The judgment of the District Court was in favor of defendant on the counter-claim.

MITCHELL, *J.*, reversing that judgment, said (p. 340) :

“ I think, however, that the so-called limitation
“ of the Act of 1881 (assuming that it means all that
“ respondent claims), is, as applied to the facts of
“ this case, unconstitutional and void. It will be
“ observed that respondent invokes this limitation, not merely for the purpose of defeating
“ appellant’s present action, but also *as the basis*
“ *of title in himself under this tax judgment and*
“ *sale.* He asks in his answer that the
“ title to the land be adjudged in him, and
“ such is the judgment of the court. This provision of the statute is not, in any proper sense,
“ a statute of limitation, as it does not operate as
“ the foundation of title to property *in possession* ;
“ neither does it merely take away certain forms

“ of *remedy*, leaving the property right of the
 “ parties unaffected (see *Kipp vs. Johnson* (1884),
 “ 31 Minn., 360). But it assumes in effect to declare
 “ that a mere claim of title on paper, unaccom-
 “ panied by possession, shall ripen into good title,
 “ as against the lawful owner in the undisputed
 “ enjoyment of his own property; as where he is in
 “ in the actual occupancy of it, or, as in this case,
 “ where it is vacant and consequently the title
 “ draws to it the legal possession. The Legislature
 “ cannot require a person in the uninterrupted
 “ enjoyment of his own property to commence an
 “ action for the purpose of vindicating his right
 “ against some void claim existing merely on
 “ paper, or to declare that by his failure to do so,
 “ the title of his property shall vest in the holder
 “ of that void claim, who has never been in pos-
 “ session under it.”

In Mississippi lands had been acquired by the State under tax sales. In 1876 an act was passed authorizing a sale of those lands by the Auditor, and providing that the deed made by him

“ shall be *prima facie* evidence of paramount title,
 “ and no suit or action shall be brought in any
 “ court of this State to vacate or impeach any such
 “ deed, or to maintain any title or deed antago-
 “ nistic thereto, unless the same shall be brought
 “ within one year next after the date of such
 “ Auditor's deed; and after the expiration of one
 “ year from the date of such Auditor's deed, the
 “ same shall be held and deemed by all the courts
 “ of the State to be conclusive evidence of para-
 “ mount title” (Laws of 1876, ch. 105, sec. 8).

In *Dingey vs. Paxton* (1883), 60 Miss., 1038, this act was before the courts.

The land in question was the property of Dingey, who died in possession in 1873. In 1875 it was sold to the State for the taxes of 1874. In 1879 the Auditor, in pursuance of the Act of 1876, conveyed to Paxton by deed dated August 26, 1879; Dingey's heirs brought ejectment on November 26, 1880.

The invalidity of the original tax sale of 1875 was conceded and the defense rested on the Act of 1876 and the fact that the action was not brought within one year from the date of the Auditor's deed.

COOPER, *J.*, said (p. 1053-1057):

"There is no doubt of the legislative will as expressed in the act. The evident purpose was to secure the title claimed by the State against all attacks by the owner upon any ground after the expiration of the time limited. The act has a two-fold operation; first, it prescribes a short period of limitation, after which no suit shall be brought by the owner for the recovery of the property; secondly, it gives to the conveyances under the tax sales a conclusive effect as evidence, thereby cutting off all inquiry into the existence of irregularities or defects, and thus operates as a curative law.

"After much thought and extended examination of the authorities, we are constrained to declare that, viewed in either light, these provisions are in excess of legislative power, and violate those fundamental rights of property which are protected by that declaration in our bill of rights, that 'no person shall be deprived of life, liberty, or property except by due process of law.'

"Before the entry of the defendant upon the lands, the plaintiffs, by their tenant, were in actual occupancy of all the land which was susceptible of cultivation, and were in the constructive pos-

" session of the whole tract. The sale of the lands
 " for the unpaid taxes of 1874 was insufficient,
 " under well-settled principles, to divest their
 " title. By a proceeding *in invitum* the State had
 " attempted to acquire title under its laws as then
 " existing and had failed. By a subsequent law it
 " provides, that, notwithstanding such failure, the
 " shadow of title thus acquired shall become the
 " actual title unless attacked within a certain
 " time. It is the expiration of time without
 " regard to possession which is to transfer title
 " from the owner and vest it in the State or its
 " vendee or donee. The power of the Legislature
 " to prescribe within what reasonable time one
 " having a mere right of action shall proceed is
 " unquestionable; but there is a wide distinction
 " between that legislation which requires one hav-
 " ing a mere right to sue to pursue the right
 " speedily, and that which creates the necessity
 " for suit by converting an estate in possession into
 " a mere right of action, and then limits the time
 " in which the suit may be brought. The mere
 " designation of such an act as an act of limitation
 " does not make it such, for it is in its nature
 " more than that. Its operation is first to divest
 " from the owner the constructive possession of
 " his property and to invest it in another, and in
 " favor of the possession thus transferred to put
 " in operation a statute of limitation for its ulti-
 " mate and complete protection. A complete title
 " to land, according to Blackstone, consists of
 " *juris et seisinæ conjunctio*: the possession, the
 " right of possession and the right of property.
 " One who is in the actual or constructive posses-
 " sion of his lands, and who has the right of pos-
 " session and of property, needs no action to en-
 " force his rights. He is already in the enjoyment

" of all that the law can give him and cannot be
 " disturbed in such enjoyment except by 'due
 " course of law.' If possession and the right of
 " possession and the right of property are each
 " an element of title, by what right can the Legis-
 " lature divest the one if it is prohibited by the
 " Constitution from interfering with the other?
 " If it be said that the owner of vacant lands is
 " only in possession thereof by a fiction of law,
 " and that the legislature may at any time destroy
 " such fiction, the reply is that this has not been
 " done or attempted to be done by the act under
 " consideration; the fiction remains, but under it the
 " owner is placed out of, and a stranger is placed
 " in, possession. It is apparent that the effort is to
 " do indirectly that which may not be directly
 " done, to divest title by a mere legislative decree.
 " * * * What is due process of law in proceed-
 " ings for the collection of taxes is left by our Con-
 " stitution largely to the legislative discretion.
 " The machinery may be simple and the proceed-
 " ings summary; but it must be a proceeding which
 " is to be, and not which has been, taken. The
 " citizen must have an opportunity to comply with
 " the requirements of the law, and the State, and
 " not the citizen, must be the actor. If, because
 " of the negligence of its agents, the State shall
 " fail to divest the citizen of his title by a sale for
 " taxes, it may begin anew and collect the amount
 " to which it is entitled; but having proceeded
 " and failed, it cannot, by a mere legislative dec-
 " laration, accomplish what it failed to do by the
 " proceedings which it had provided."

In Missouri the statute was as follows (Wagner's
 Statutes, p. 1207 sec. 221):

" Any suit or proceeding against the tax pur-
 " chaser, his heirs or assigns, for the recovery of

“ lands sold for taxes, or to defeat or avoid a sale
 “ or conveyance of lands for taxes * * * shall
 “ be commenced within three years from the time
 “ of recording the tax deed, and not thereafter.”

In *Spurlock vs. Dougherty* (1883), 81 Mo., 171, this act was held void as against the owner in possession. The action was ejectment by the tax purchaser against the owner. The sale was made in 1872, and the deed to plaintiff recorded in 1874. The suit was brought in 1878, after the time fixed by the statute had run. The land was vacant from the time of the sale until 1878, when defendant—the original owner—entered.

EWING, C., says (p. 182) :

“ The plaintiff in error insists that by section
 “ 221, if the tax purchaser records his deed, ‘suit
 “ must be brought within three years to invalidate
 “ the deed.’ * * *

“ This suit, it will be observed, is by the ‘tax
 “ purchaser,’ and against the defendants, who claim
 “ to be the owners. If this position be correct, it
 “ would require the party in possession to sue for
 “ possession. The defendants being in possession
 “ and claiming title, had no occasion to sue. No law
 “ can compel one who has possession under claim
 “ of right to take legal steps against an outstand-
 “ ing or opposing claim. Such an one has none
 “ of his rights assailed, and having all the law can
 “ give him, he cannot be called upon to litigate or
 “ contest pretended or alleged claims until he is
 “ assailed. If one be ousted of his land, he then
 “ must assert his rights by suit, within the time
 “ prescribed by law, or forfeit his claim by the
 “ lapse of time. If not, the law of limitations pre-
 “ sumes that he has abandoned all claim. Such
 “ laws can only operate against one who is not

“already in the enjoyment and dominion of his rights. Statutes of limitation are designed to compel one whose rights are withheld to assert them within the time prescribed, but can have no effect upon him who has possession. If the tax purchaser, in this case, had possession, then the owner must assert his claim by suit within the time prescribed by the statute or be forever barred.”

This case follows *Grossbeck vs. Seeley* (1865), 13 Mich., 329, and *Baker vs. Kelley* (1866), 11 Minn., 480.

The same statute was before the United States Circuit Court for Missouri, in *Daniels vs. Case* (1891), 45 Fed. Rep., 843, and it was again held to have no application as against the owner in possession.

In Louisiana the statute was, that

“Any action to invalidate the title to any property purchased at tax sale, under or by virtue of any law of this State, shall be prescribed by a lapse of three years from the date of such sale” (Acts of La., 1874, No. 105, sec. 5).

In *Land Trust of Indianapolis vs. Hoffman* (1893), 57 Fed. Rep., 333, the United States Circuit Court of Appeals held that this statute did not in any way affect the title of the owner in possession, and that the tax purchaser, seeking to establish his tax deed, must recover, if at all, upon the strength of his own title—following the decisions of the State courts to the same effect.

In some States the statutes are in such form that the recording of the tax deed operates, when the lands are vacant, to put the tax purchaser in constructive possession and thereby set time running in his favor.

This seems to be the theory of the Wisconsin statute.

Jones *vs.* Collins (1863), 16 Wis., 594, 603.

Taylor *vs.* Miles (1870), 5 Kansas, 498, 514.

But as the possession of land is one of the elements of complete and perfect title to that land, the validity of such a statute, *when made to operate upon past deeds*, may well be questioned. The provisions of the fundamental law which protect the property of a citizen must protect equally all the elements which go to make up that property.

The New York statute now in question contains no such provision. It does not provide for transferring to the tax purchaser that constructive possession which the law annexes to the legal title. By another statute, passed on the same day, it is provided that the Comptroller shall publish a certain notice, and that after such publication he shall be deemed to be in *actual possession* of all lands claimed by the State (chap. 453, Laws of 1885, sec. 4. Appendix, p. 83). Both acts are in terms amendatory of chapter 427, Laws of 1855, and should be construed together. The Comptroller did not publish this notice (Record, p. 50 ; Findings 30 and 31).

It would seem, therefore, that the Legislature had in mind the necessity of ousting the true owner in order to convert his estate in possession into a right of action, to the end that the limitation which they were establishing might run against it. They provided expressly for putting the State, through the Comptroller, in possession. Had this notice been published, the former owner—Norton—would have been disseized and an appropriate case would have existed for the operation of a limitation law. This was, we think, the purpose and intent of the Legislature. It failed of accomplishment through the inaction of the Comptroller.

It is, we think, plain law that neither the execution

nor the recording of a void tax deed operates of itself to divest the true owner of the constructive possession of vacant land.

- Johnson *vs.* Elwood (1873), 53 N. Y., 431.
 Thompson *vs.* Burhans (1874), 61 N. Y., 52, 67, 68.
 Thompson *vs.* Burhans (1879), 79 N. Y., 93.
 People *ex rel.* Millard *vs.* Roberts (1896), 8 App. Div., 219.
 Little *vs.* Megquier (1822), 2 Greenl., 176.
 Marston *vs.* Hobbs (1807), 2 Mass., 433.
 Bates *vs.* Norcross (1833), 14 Pick., 224.
 Field *vs.* Inhabitants of Hawley (1879), 126 Mass., 327.
 Gomer *vs.* Chaffee (1882), 6 Col., 314.
 Gates *vs.* Kelsey (1893), 57 Ark., 523.
 Taylor *vs.* Miles (1870), 5 Kan., 498, 514.
 Patton *vs.* Luther (1877), 47 Iowa, 236.
 Woolfork *vs.* Buckner (1895), 60 Ark., 163.

III.—THE PERIOD OF TIME ALLOWED BY THE ACT IN QUESTION—SIX MONTHS—WITHIN WHICH LAND-OWNERS MIGHT ASSERT THEIR RIGHTS AS AGAINST ILLEGAL TAX SALES WAS UNREASONABLY SHORT AND AMOUNTED TO PRACTICAL CONFISCATION.

We concede the power of the Legislature to prescribe new periods of limitation as against existing causes of action, and that the length of time to be allowed for the assertion of such rights is in general a matter of legislative discretion. But the Legislature must allow *some* time, and that time cannot be made so short as to amount to a virtual denial of justice; or, as the rule is commonly expressed, a reasonable time must be given.

Cooley, Const. Lim., 6th ed., p. 450.

Whether the time allowed in any given case is reasonable or not must in the end be a judicial question.

Terry vs. Anderson (1877), 95 U. S., 628.

Mills vs. Scott (1878), 99 U. S., 25, 27.

Koshkonong vs. Burton (1881), 104 U. S. 668, 675.

In re Brown (1889), 135 U. S., 701, 705.

Pereles vs. City of Watertown (1874), 6 Biss., 79, 84.

Parmenter vs. The State (1892), 135 N. Y., 154, 167.

In *Koshkonong vs. Burton* (1881), 104 U. S., 668, it is said by HARLAN, J. (p. 675):

“It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental conditions that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect.”

The question whether the time allowed by the act in question is reasonable or not must depend, of course, upon the circumstances under which it was enacted. In considering this question we assume that this Court will take judicial notice of everything which was so known to the New York Courts.

Hanley vs. Donoghue (1885), 116 U. S., 1.

We also assume that the validity of a statute depends not so much upon what *is* done as upon what *may* be done under it.

Stuart vs. Palmer (1878), 74 N. Y., 183.

The question in the present case is, not whether six months was a sufficient time for the owner of the particular land now in question to assert his rights, but whether it was a sufficient time for land-owners generally.

As was said by PECKHAM, *J.*, in the *Parmenter* case above cited (135 N. Y., 154, 168) :

" This question of reasonable time cannot of course, form the subject of an inquiry in the case of each individual to be affected by the alteration of the law. It must be decided by the Court as a question of law, and upon a general consideration of all facts in regard to which Courts will take judicial notice."

There is first to be considered that there was no public emergency calling for legislative action, like the disorganization of society resulting from civil war, which was relied on by this Court in *Terry vs. Anderson* (95 U. S., 628) to sustain a summary abridgment of the right to assert existing claims.

It is not known that any grave public reasons existed in New York in 1885 which made it necessary for the public good that the right of the owner of *vacant* forest land to assert his title—a right which had never been subject to any limitation law whatever—should be suddenly cut short; or that as to lands held adversely under a tax title, the twenty years allowed by the general limitation law should be reduced to six months.

The words of Mr. Justice PECKHAM in *Parmenter vs. The State* used with reference to a statute cutting short the time within which certain money claims might be made against the State, apply to this aspect of the present case (135 N. Y., 154, 170) :

" The Court will take judicial notice of the fact that there was, in regard to the statute under

“ consideration in this case, no grave or public ex-
 “ igency in existence which appealed to the leg-
 “ lature, in behalf of the whole people, and for the
 “ public interests, for the enactment of a statute
 “ curtailing, to the shortest possible legal time, the
 “ right to commence actions which, up to the
 “ passage of the Act of 1883, was unlimited.

The real reason for the passage of the act in question is disclosed in the report of Comptroller Chapin to the Legislature of 1888. He says (p. 19) :

“ During the past few years attention has been di-
 “ rected to the importance of preserving our forests
 “ and of maintaining the State's title, mainly acquired
 “ through tax sales, to a very large area of wild or
 “ forest lands. In 1885, and for some time prior
 “ thereto, it became apparent from the testimony
 “ given at the trial of trespassers on State lands that
 “ the State could not, by reason of the irregular
 “ methods prevalent in past years of assessing lands
 “ and levying taxes, successfully support its title
 “ thereto or prevent or prosecute trespassers thereon.
 “ Chapter 448 of the Laws of 1885 was the outcome
 “ of such disclosure.”

The lands title which was sought to be affected were non-resident lands ; that is, lands not actually occupied by the owner or by any one else. It is such lands only which can be sold for unpaid taxes, and the statute in terms is confined to them.

Joslyn vs. Rockwell (1891), 128 N. Y.,
 334.

The area of such land in the forest counties affected by the act was large—upward of two million acres. (See message of Governor Black to the legislature of 1897.)

The owners of such lands may have been citizens of New York or they may have been scattered all over

the United States or resident abroad. The policy of the State had always been to allow land sold for taxes to the State to be reclaimed on payment of the amount due. The legislation now in question was a complete reversal of that policy. How soon after the passage of the new law ought knowledge of its existence to be imputed to them? Sufficient time to allow the new law to become known to those to be affected by it must be given (see *Parmenter vs. The State*, 135 N. Y., 167).

Another, and, as it seems to us, a very important circumstance bearing on the question is that the tax deeds to be affected by the new law might extend back over a period of more than half a century. The statute relates to *all* conveyances that have heretofore been executed by the Comptroller. As we have already shown, it has been the practice in New York for the Comptroller to sell non-resident lands for unpaid taxes, and to give deeds therefor, since at least as early as the Revised Statutes of 1828. Many of these deeds were mere waste paper when they were made, and had been recognized and treated as such by all parties concerned. Their existence, though on record, had been forgotten. No rights were claimed under them. The owners of the lands—or those who supposed themselves to be such—may have been paying taxes for years, relying upon the conceded invalidity of these long past and forgotten papers. An illustration of the way in which this statute operates is furnished by the case of *Joslyn vs. Pulver* (59 Hun, 129, affirmed *sub nom.*, *Joslyn vs. Rockwell* 128 N. Y., 334), in which one party claimed under a tax deed of 1834 and the other under a tax deed of 1856.

LONDON, *J.*, says (p. 135):

“ Here deeds which for more than twenty years
 “ were not worth asserting are claimed to be res-
 “ urrected and validated by statute.”

As soon as the act in question became known to the owner of non-resident land it became incumbent on him, although his title had never been questioned in any way, to at once cause search to be made to ascertain whether, at some remote period the land of which he may have been in unquestioned enjoyment for years had been sold for taxes and a Comptroller's deed recorded. If the search disclosed the existence of such deed, then he must search for the present owners of the formal tax title, who may be either the original purchaser, his heirs, devisees or grantees (for the statute recognizes the grantees of the tax purchaser).

If the record disclosed no conveyance by the original tax purchaser, then it became necessary to discover that purchaser, and whether he were dead or alive. All this it was necessary to do before the land-owner could be in a position to bring suit to attack the void tax deed, the owner of the formal tax title being of course an indispensable party to any suit to set it aside.

Under these circumstances it was absolutely necessary for the Legislature seeking to validate past tax deeds under cover of a statute of limitation to allow to the land-owner time in which to learn of the new law ; time to investigate and discover whether or not he was to be affected by it, and time to ascertain whom he must sue ; or, to recur again to the words of Mr. Justice PECKHAM in the *Parmenter* case (135 N. Y., 171), time in " which to learn of the passage of the statute, "elect what course to pursue, and, having made the "election, carry out the same."

The time allowed by the statute in question was we contend, wholly insufficient for this purpose.

Had it provided that a tax purchaser, seeking the protection of the new law, should in some way give notice of his claim, as by taking possession of the land, or even by publishing a notice, there might have been

some color of justice to it. But to allow the tax purchaser to keep silent and do nothing to put the true owner on his guard, or call his attention to the necessity of action, is to make the statute a measure of confiscation. It may be said that the tax purchaser by recording his deed had already given notice of his claim. The answer is, that when this was done he had no legal claim, and both parties knew it. His deed, which was void when made, got no life by being spread upon the records, and for years he had himself treated it as the nullity it was by making no claim under it.

The Legislature, not content with passing a law which required nothing to be done to put the landowner on his guard, took affirmative action, which operated, whether so intended or not, to prevent that owner from taking legal action to assert his rights. The act purported in terms to leave all past tax sales subject to cancellation by the Comptroller during the six months after its passage. But this remedy, *when it was too late to resort to any other*, was adjudged to be wholly illusory, by the Court of Appeals in *People ex rel. Wright vs. Chapin* (1886), 104 N. Y., 369. The man whose land had been illegally sold for taxes was adjudged to have no standing before the Comptroller and not to be "aggrieved" by the action of that official in denying to him the remedy to which the Legislature had apparently said he was entitled.

To recur again to the report of Comptroller Chapin (Report of 1888, p. 22) :

" Within the six months allowed by chapter 448, Laws of 1885, a large number of applications, principally to set aside the State's title to its valuable wild and forest lands, were filed in this office, but pursuant to the decisions of the Court of Appeals, cited above, the greater proportion of the applicants not being entitled to recognition, such applications have been denied."

We respectfully submit that in determining whether or not the time allowed by the statute within which the land-owner might take action to assert his rights was or was not reasonable, it is proper for the Court to consider the action of the State in holding out to that owner, through one branch of the Government, the promise of a simple and expeditious adjustment of his claim through the Comptroller, and then when "a large number" of such land-owners had acted in reliance upon that promise and allowed the time for other action to expire, to repudiate it through the courts and treat the owner as having forfeited all his rights, through his own laches. Is a law which so operates a reasonable limitation upon the assertion of existing claims, or is it a denial of justice?

As regards lands which had been bought in by the State itself, the situation was still further complicated by the uncertainty which then existed and still exists as to what, if any, remedy was given to the land-owner in such case. Sue the State directly he certainly could not. How could that be done indirectly which directly was forbidden? This was the question which the land-owner was called upon to answer. How much time, under such circumstances, ought reasonably to be allowed in which to "elect" what course to pursue, and, having made the election, "carry out the same"?

It is now claimed that the Forest Commission, having been clothed with actual possession by the statute creating it, the land-owner was given a remedy by action of ejectment against that Commission. We have endeavored to show above that the Forest Commission had no such possession, and that the alleged remedy by action against it was wholly illusory. Such an action can only be maintained on the theory that the person proceeded against is individually a trespasser and a wrongdoer. It is a contradiction in terms to say that any man can be made a wrongdoer by operation of law. But, assuming for the

argument that such possession existed, and that such action might have been brought, still we say that the six months allowed by the statute was not a reasonable time within which ordinary citizens and their legal advisers could discover that such remedy existed and avail themselves of it, because,

First—No act was done to show that the Commission was in possession (Record, p. 28, Finding IX.).

Second—The statute passed at the same time and *in pari materia* provided that the *Comptroller* should take possession, which he did not do.

Chap. 453 of 1885, Appendix, p. 83.

Third—Any construction now made of the law in force in 1885 regarding tax sales, which attaches possession, actual or constructive, to a deed made in pursuance of an illegal tax sale, must of necessity overrule the decisions of the highest court of the State which were then in force which denied such possession (53 N. Y., 431), and is in effect retroactive judicial legislation, designed to save the statute by pointing out a remedy when it is too late for the land-owner to avail himself of it.

Fourth—The construction of the Forest Commission Act which puts that Commission in actual possession is forced and unnatural, and one which was not suggested until long after the bar of chapter 448 had fallen.

We therefore respectfully insist that, so far as a remedy by way of ejectment or other action against the Forest Commission is concerned, it was not known to the land-owner in 1885 that it existed. Its existence is doubtful now.

If the remedy suggested were the only remedy secured to the land-owner by the Act of 1885, six months was not sufficient time within which to compel land-owners to make a discovery which it has taken the courts ten years to make. If the right to bring ejectment against the Forest

Commission existed in 1885, it was hidden so deep in the bosom of the law that knowledge of such right ought not to be imputed to any citizen.

In *Re Brown* (1889), 135 U. S., 705, this Court held that a statute of Virginia requiring legal proceedings to establish the genuineness of coupons attached to bonds issued by the State, to be brought within one year, and invalidating them unless so established, was so unreasonable in point of time, under the circumstances of the case, as to be void.

In the *Parmenter case*, to which we have several times referred (135 N. Y., 154), the New York Court of Appeals held that a statute limiting the time within which certain claims against the State must be filed to three months and some days, was so unreasonably short that, had it been a statute limiting the right of one citizen to sue another, it would have been void as not due process of law. In that case the claimant labored under none of the embarrassments to which, as we have endeavored to show, land-owners were subject with reference to the law of 1885. He knew that he had a claim; he knew against whom.

The opinion of Mr. Justice PECKHAM in this case contains a full review of the decisions bearing upon the question, and we cannot better call the attention of the Court to them than by quoting such review in full. He says (135 N. Y., 154):

"Before answering the question in this case it will be well to examine what has been said by other courts upon the matter, even though the express point has not been actually decided in all cases. It will give some idea of the views other judges have taken of the subject.

"In *Hawkins vs. Barney's Lessee* (5 Peters, 457), the act reduced the limitation period from twenty years under the original Virginia statute to seven years under the statute of Kentucky, and it was

" held a valid act. The contention in this case
 " was that Kentucky was bound to continue the
 " same law of limitations so far as regarded the
 " lands which were once under the jurisdiction of
 " Virginia, as obtained in the latter State at the
 " time of the compact between her and Kentucky.
 " This contention was not upheld. The case, al-
 " though it has been heretofore cited as authority
 " on this point, has, as it seems to me, very little
 " application.

" In *Jackson vs. Lamphire* (3 Pet., 280), the act
 " of the Legislature of New York (chap. 51 of the
 " Laws of 1797, passed March 24 of that year) was
 " claimed to be void as impairing the obligation of
 " contracts. It rendered a certain award made by
 " Commissioners to quiet the titles to land in
 " Onondaga County, a bar to any action not com-
 " menced within three years after the award. The
 " act was held valid in any view considered as an
 " act of limitation as to existing rights or as a re-
 " cording act.

" In *Sohn vs. Waterson* (17 Wall., 596) the statute
 " gave, as construed by the Court, two years from
 " its date in which to commence action upon ex-
 " isting causes of action at the time of its passage,
 " and it was held sufficient.

" In *Call vs. Hagger* (8 Mass., 423), an act limit-
 " ing the commencement of suit to a period of one
 " year subsequent to the passage thereof in cases
 " where a cause of action had already accrued was
 " thought not to be unreasonable by the Court, but
 " the statute was, nevertheless, construed an inap-
 " plicable to a cause of action which had accrued
 " before its passage.

" In *Krone vs. Krone* (37 Mich., 308) the statute
 " limited the time as to existing causes to one year
 " from its passage, and it was held reasonable.

" In *Berry vs. Ransdall* (4 Met. [Ky.] 292) it was held that a statute limiting the time to commence action on existing causes of action to thirty days was unreasonable and invalid.

" In *Lewis vs. Harbin* (5 B. Mon. [Ky.], 564, 571), the Court, per Ewing, *Ch. J.*, said that if a statute should limit the right to commence an action upon a cause thereof existing at the time of its passage to five months thereafter, 'a time scarcely sufficient to enable even lawyers of the community to learn that such a law had passed, such an enactment would have shocked the moral sense of mankind as unjust and iniquitous.'

" Again, in *Pearce's Heirs vs. Patton* (7 B. Munroe [Ky.] 162, 168), the same Court said that 'six months is not the time prescribed for the suit, but seven years, and if it was, we should hardly regard it as a reasonable time to be constitutionally available to bar the remedy as a mere act of limitation.'

" In *Pereles vs. City of Watertown* (6 Biss., 79), Hopkins, *J.*, who was United States Judge for the Western District of Wisconsin, held that a limitation of one year from the passage of the act, as applied to existing municipal bonds issued for negotiation in a foreign market, was clearly unreasonable and unconstitutional. The learned Judge conceded that, so far as the statute might be applicable to causes of action accruing after the passage of the statute, the Legislature had absolute power to fix the time within which an action might be brought, as in such a case he said the parties may be supposed to have contracted with reference to it; but a very different rule was held to apply in regard to statutes of limitation intended to affect existing causes of action, and the learned author (Cooley on Constitutional Lim. [5th ed.], 451), says statutes of this kind must allow a reasonable time, and if

“ the period is manifestly too short, the courts will
 “ hold the statute invalid as in such case consti-
 “ tuting a denial of justice.

“ In our own Court, the case of *Rexford vs.*
 “ *Knight* was decided in 1854 and reported in 11
 “ N. Y., 308. The limitation of one year in the
 “ case of a claimant whose land had already been
 “ appropriated by the State in which to exhibit
 “ his claim to the canal appraisers for damages,
 “ was held sufficient. Judge Johnson, in the
 “ course of his opinion, said the Court, in order
 “ to pronounce the law unconstitutional, must see
 “ that the limitation is so short that the unmis-
 “ takable purpose and effect of the law is to cut off
 “ the right of the party, and not merely to limit
 “ the time in which he may begin to enforce it.

“ This language, it must be remembered, is used
 “ with relation to a statute which in fact gave a
 “ full year from the time of its passage in which to
 “ exhibit the claim.”

We say, therefore, in all confidence, that considering the situation which existed in the State of New York in 1885 as to lands sold for taxes and bought in by the State, this Court can plainly see that “ the unmistakable purpose and effect of the law ” of 1885 was “ to cut off the right of the party, and not merely to limit the time in which he may begin to enforce it.”

It follows, therefore, that the law in question, chapter 448 of 1885, is unconstitutional and void.

THIRD.

The judgment of the Courts of New York should be reversed and a new trial ordered.

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March 1, 1897.

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Supreme Court of the United States.

BENTON TURNER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW
YORK,
Defendant in Error.

No. 273.

Appendix to Brief for plaintiff in error.

Counsel have endeavored in this appendix to collect the Statutes of New York to which reference is made in the brief, and also those relating to taxation to which reference is made in the opinions of the principal New York authorities cited.

We have intended to submit these statutes as they were at the time the tax proceedings were had which have given rise to this controversy; that is, between 1866 and 1885. We have added some short statutes of a later date amending the act (chap. 448 of 1885), the validity of which is challenged.

We have omitted certain titles of the Revised Statutes relating to taxation of corporations and to certain counties only. We have also omitted from the act creating the Forest Preserve and the Forest Commission certain

sections relating to minor details of the organization and duties of that Commission which do not seem material to any question in the present case.

We have included in this appendix a copy of the record which was before the New York Court of Appeals in *The People ex rel. The Equitable Life Assurance Society of the United States vs. Chapin as Comptroller*, together with the judgment of that Court thereon, reported in memorandum only in 105 N. Y., 629.

A copy of this record, duly certified by the Clerk of Albany County, in whose office the record remains, is also submitted.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error.

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(Took effect January 1, 1828.)

PART I., CHAPTER XIII.

OF THE ASSESSMENT AND COLLECTION OF TAXES.

Title I.

OF PROPERTY LIABLE TO TAXATION.

What Subject to Taxation.

SECTION 1. All lands and all personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified.

Land Defined.

§ 2. The term "land," as used in this chapter, shall be construed to include the land itself, all buildings, and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils, in and under the same, except mines belonging to the state; and the terms "real estate" and, "real property," whenever they occur in this Chapter, shall be construed as having the same meaning as the term "land" thus defined.

Personal Estate Defined.

§ 3. The terms "personal estate," and "personal property," whenever they occur in this Chapter, shall be construed to include all household furniture; monies; goods; chattels; debts due from solvent debtors, whether on account, contract, note, bond or mortgage; public stocks; and stocks in monied corporations. They shall also be

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construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

Property Exempt from Taxation.

§ 4. The following property shall be exempt from taxation :

1. All property, real or personal, exempted from taxation by the constitution of this state, or under the constitution of the United States :

2. All lands belonging to this state, or the United States :

3. Every building erected for the use of a college, incorporated academy, or other seminary of learning ; every building for public worship ; every school-house, court-house and jail ; and the several lots whereon such buildings are situated, and the furniture belonging to each of them :

4. Every poor-house, alms-house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, and the real and personal property belonging to, or connected with the same :

5. The real and personal property of every public library :

6. All stocks owned by the state, or by literary or charitable institutions :

7. The personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter :

8. The personal property of every minister of the gospel, or priest, of any denomination ; and the real estate of such minister, or priest, when occupied by him, provided such real and personal estate do not exceed the value of one thousand five hundred dollars : and,

9. All property exempted by law from execution.

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Deductions in Case of Minister, etc.

§ 5. If the real and personal estate, or either of them, of any minister or priest, exceed the value of one thousand five hundred dollars, that sum shall be deducted from the valuation of his property, and the residue shall be liable to taxation.

Lands Sold by the State.

§ 6. Lands sold by the state, though not granted, or conveyed, shall be assessed in the same manner as if actually conveyed.

Individual Owners of Stocks.

§ 7. The owner or holder of stock in any incorporated company liable to taxation on its capital, shall not be taxed as an individual, for such stock.

Title II.

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OF THE PLACE AND MANNER IN WHICH PROPERTY IS TO BE
ASSESSED.

ARTICLE FIRST.

OF THE PLACE IN WHICH PROPERTY IS TO BE ASSESSED.

Lands, Where Taxed.

SECTION 1. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him, or wholly unoccupied.

Lands not Occupied by Owner.

§ 2. Land occupied by a person other than the owner, or may be assessed to the owner occupant, or as non-resident lands.

[As amended by L. 1851, ch. 176.]

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Non-resident Lands Defined.

§ 3. Unoccupied lands, not owned by a person residing in the ward or town where the same are situated, shall be denominated "lands of non-residents," and shall be assessed as hereinafter provided.

Lands Divided by Boundary Lines.

§ 4. When the line between two towns or wards divides a farm, or lot, the same shall be taxed, if occupied, in the town or ward where the occupant resides; if unoccupied, each part shall be assessed in the town in which the same shall lie; and this, whether such division line be a town line only, or be also a county line.

Personal Estate, where Taxed.

§ 5. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property so held under either of these trusts, be assessed against any other person, and in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence for the purposes and within the meaning of this section, shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted, but the products of any state of the United States, consigned to agents in any town or ward of this state, for sale on commission, for the benefit of the owner thereof, shall not be assessed to such agent, nor shall such agents of monied corporations or capitalists be liable to taxation under this section, for any monies in their possession or under their control transmitted to them for the purposes of investment or otherwise.

[As amended by L. 1851, ch. 176.]

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Property of Corporations, where Taxed.

§ 6. The real estate of all incorporated companies liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital, shall be assessed in the town or ward where the principal office, or place for transacting the financial concerns of the company, shall be ; or if such company have no principal office, or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on. In the case of toll-bridges, the company owning such bridge shall be assessed in the town or ward in which the tolls are collected ; and where the tolls of any bridge, turnpike, or canal company, are collected in several town or wards, the company shall be assessed in the town or ward, in which the treasurer or other officer authorized to pay the last preceding dividend, resides. [390]

ARTICLE SECOND.

OF THE MANNER IN WHICH ASSESSMENTS ARE TO BE MADE, AND THE DUTIES OF THE ASSESSORS.

Assessment Districts.

§ 7. The assessors chosen in each town or ward, may divide the same by mutual agreement, into convenient assessment districts, not exceeding the number of assessors in such town or ward.

Inquiry as to Names of Taxable Inhabitants.

§ 8. Between the first days of May and July, in each year, they shall proceed to ascertain, by diligent inquiry, the names of all the taxable inhabitants, in their respective towns or wards, and also all the taxable property, real or personal, within the same.

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Assessment-Roll, Form Of.

§ 9. They shall prepare an assessment-roll, in which they shall set down in four separate columns, and according to the best information in their power :

1. In the first column, the names of all the taxable inhabitants, in the town or ward, as the case may be :

2. In the second column, the quantity of land to be taxed to each person :

[391] 3. In the third column, the full value of such land, according to the definition of the term land, as given in the first Title of this Chapter :

4. In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him.

Trustee, Guardian, etc., how Assessed.

§ 10. Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment ; and he shall be assessed for the value of the real estate held by him, in such representative character, at the full value thereof, and for the personal property held by him in such representative character, deducting from such personal property the just debts due from him in such representative character.

Lands of Non-residents.

§ 11. The lands of non-residents shall be designated in the same assessment-roll, but in a part thereof separate from the other assessments, and in the manner prescribed in the two following sections.

Proceedings of Assessors where Tract is Subdivided.

§ 12. If the land to be assessed, be a tract which is subdivided into lots, or be part of a tract which is so subdivided, the assessors shall proceed as follows :

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1. They shall designate it by its name, if known by one, or if it be not distinguished by a name, or the name be unknown, they shall state by what other lands it is bounded ;

2. If they can obtain correct information of the subdivisions they shall put down in their assessment-rolls, and in a first column, all the unoccupied lots in their town or ward, owned by non-residents, by their numbers alone and without the names of their owners, beginning at the lowest number and proceeding in numerical order to the highest ;

3. In a second column, and opposite to the number of each lot, they shall set down the quantity of land therein, liable to taxation ;

4. In a third column, and opposite to the quantity, they set down the valuation of such quantity ;

5. If such quantity be a full lot, it shall be designated by the number alone ; if it be part of a lot, the part must be designated by boundaries, or in some other way, by which it may be known.

Same, where Tract is not Subdivided.

§ 13. If the land so to be assessed be a tract which is not subdivided, or if its subdivisions cannot be ascertained by the assessors, they shall proceed as follows :

1. They shall enter in their roll the name or boundaries thereof, as above directed, and certify in the roll that such tract is not subdivided, or that they can not obtain correct information of the subdivisions, as the case may be ;

2. They shall set down in the proper column, the quantity and valuation as above directed ; [392]

3. If the quantity to be assessed be the whole tract, such a description by its name or boundaries will be sufficient ; but if a part only is liable to taxation, that part or the part not liable, must be particularly described ;

4. If any part of such tract be settled and occupied by a resident of the town or ward, the assessors shall except such part from their assessment of the whole tract, and shall assess it as other occupied lands are assessed ; and if

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they can not otherwise designate such parts, they shall notify the supervisor of the town, who shall cause a survey and two manuscript maps to be made, for the purpose of ascertaining the situation and quantity of every such occupied part;

5. One of those maps shall be delivered by the supervisor to the county treasurer, to be by him transmitted to the comptroller, and the other shall be delivered in like manner to the assessors;

6. The assessors shall then complete the assessment of the tract, and shall deposit the map in the town clerk's office, for the information of future assessors. And the expense of making such survey and map shall be immediately repaid to the supervisor, out of the county treasury; and it shall be added by the board of supervisors to the tax on the tract, distinguishing it from the ordinary tax.

Survey of Non-resident Lands Divided by Town Line.

§ 14. Whenever it shall be deemed necessary by the assessors of any town, to have an actual survey made, to ascertain the quantity of any lot or tract of non-resident lands which is divided by the town line, they shall notify the supervisor, who shall cause the necessary surveys to be made at the expense of the town.

[Sections 15 and 16 repealed by L. 1851, ch. 176.]

Rule of Valuation.

[393] § 17. All real and personal estate liable to taxation, shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor.

[As amended by L. 1851, ch. 176.]

Qualification of Rule.

§ 18. The preceding section shall be followed in all assessments made under this Chapter, except where the

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assessors shall be specially required by law to observe a different rule.

Roll, when to be completed ; Notice.

§ 19. The assessors shall complete the assessment-rolls on or before the first day of August, in every year, and shall make out one fair copy thereof, to be left with one of their number. They shall forthwith cause notices thereof to be left with one of their number ; they shall forthwith cause notices thereof to be put up at three or more public places in their town or ward ; and in case the assessment-roll shall include property belonging to a railroad corporation, they shall at the same time cause a like notice to be mailed to the treasurer thereof, or delivered to the railroad agent at the nearest station.

[As amended by L. 1857, ch. 536 and L. 1858, ch. 110.]

Contents of Notices.

§ 20. Such notices shall set forth that the assessors have completed their assessment-roll, and that a copy thereof is left with one of their number at a place to be specified therein, where the same may be seen and examined by any person interested, until the third Tuesday of August ; and that on that day the assessors will meet at a time and place also to be specified in such notice, to review their assessments. On the application of any person conceiving himself aggrieved, it shall be the duty of the said assessors on such day to meet at the time and place specified, and hear and examine all complaints in relation to such assessments that may be brought before them ; and they are hereby empowered, and it shall be their duty to adjourn from time to time, as may be necessary, to hear and determine in accordance with the rule prescribed by section fifteen of said title two, such complaints ; but in the several cities of this state, the notices, required by this section, may conform to the requirements of the respective laws regulating the time place and manner for revising the assessments

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in said cities, in all cases where a different time, place, and manner is prescribed by said laws from that mentioned in this act.

[As amended by L. 1851, ch. 176 and L. 1857, ch. 536.]

Inspection of Roll.

§ 21. The assessor with whom such assessment-roll is left, shall submit the same, during the twenty days specified in such notice, to the inspection of all persons who shall apply for that purpose.

[Sections 22, 23, 24, 25 and 26 repealed by L. 1851, ch. 176.]

Delivery of Rolls by Assessors.

[394] § 27. The roll, thus certified, shall, on or before the first day of September in every year, be delivered by the assessors of each ward, in the city of New York, to the clerk of the city, and by the assessors of every other town or ward, to the supervisor thereof, who shall deliver the same to the board of supervisors at their next meeting.

Assessors to Act under Instructions from Comptroller.

§ 28. The assessors, in the execution of their duties, shall use the forms, and pursue the instructions, which shall from time to time be transmitted to them by the comptroller.

Neglect of Duty by Assessors.

§ 29. If any assessor shall willfully refuse or neglect to perform any of the duties required of him, by this Chapter, he shall forfeit, to the people of this state, the sum of fifty dollars.

Names of Delinquent Assessors to be Certified.

§ 30. If any assessor shall neglect, or from any cause omit to perform his duties, the other assessors, or either of them, of the town or ward, shall perform such duties, and shall certify to the supervisors with their assessment-

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roll, the name of such delinquent assessor, stating therein the cause of such omission.

ARTICLE THIRD.

[395]

OF THE EQUALIZATION OF THE ASSESSMENTS, AND THE CORRECTION OF THE ASSESSMENT ROLLS.

Supervisor to Examine Assessment Rolls.

§ 31. The board of supervisors of each county in this state, at their annual meeting, shall examine the assessment-rolls of the several towns in their county, for the purpose of ascertaining whether the valuations in one town or ward, bear a just relation to the valuations in all the towns and wards, in the county; and they may increase or diminish the aggregate valuations of real estates, in any town or ward, by adding or deducting such sum upon the hundred as may, in their opinion, be necessary, to produce a just relation between all the valuations of real estates in the county; but they shall, in no instance, reduce the aggregate valuations of all the towns and wards, below the aggregate valuation thereof, as made by the assessors.

Lands of Non-residents.

§ 32. The board of supervisors shall also make such alterations in the descriptions of the lands of non-residents, as may be necessary to render such descriptions conformable to the provisions of this chapter; and if such alterations can not be made, they shall expunge the descriptions of such lands, and the assessments thereon, from the assessment-rolls.

Tax to be Set Down.

§ 33. They shall also estimate and set down in a fifth column, to be prepared for that purpose, in the assessment-rolls, opposite to the several sums set down as the valuations of real and personal estates, the respective sums in

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dollars and cents, rejecting the fractions of a cent, to be paid as a tax thereon.

Aggregate Valuation to be Determined.

§ 34. They shall also add up and set down the aggregate valuations of the real and personal estates in the several towns and wards, as corrected by them; and shall cause their clerk to transmit to the comptroller, by mail, a certificate of such aggregate valuations, showing separately, the aggregate amount of real and personal estate in each town or ward, as corrected by the board.

Corrected Assessment-Roll to be Delivered.

§ 35. They shall cause the corrected assessment-roll of each town or ward, or a copy thereof, to be delivered to each of the supervisors of the several towns or wards, who shall deliver the same to the clerk of their city or town, to be kept by him for the use of such city or town.

Copies to be Delivered to Collectors.

[396] § 36. The boards of supervisors of the several counties in this state, shall cause the corrected assessment-roll of each town or ward in their respective counties, or a fair copy thereof, to be delivered to the collector of such town or ward, on or before the fifteenth day of December in each year.

Contents of Warrant to Collectors.

§ 37. To each assessment-roll, so delivered to a collector, a warrant, under the hands and seals of the board of supervisors, or of a majority of them, shall be annexed, commanding such collector, to collect from the several persons named in the assessment-roll, the several sums mentioned in the last column of such roll, opposite to their respective names.

If the warrant be directed to the collector of a town, it shall direct the collector, out of the monies so to be col-

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lected, after deducting the compensation to which he may be legally entitled, to pay,

1. To the commissioners of common schools of his town, such sum as shall have been raised for the support of common schools therein :

2. To the commissioners of highways of the town, such sum as shall have been raised for the support of highways and bridges therein :

3. To the overseers of the poor of the town, if there be no county poor-house, or other place provided in the county for the reception of the poor, such sum as shall have been raised for the support of the poor in such town :

4. To the supervisor of the town, all other monies which shall have been raised therein, to defray any other town expenses : and,

5. To the treasurer of the county, the residue of the monies so to be collected.

If the warrant be directed to the collector of a ward, it shall direct the collector to pay all the monies to be collected, after deducting his compensation, to the treasurer of the county.

In all cases, the warrant shall authorize the collector, in case any person named in the assessment-roll shall refuse or neglect to pay his tax, to levy the same by distress and sale of the goods and chattels of such persons ; and it shall require all payments therein specified, to be made by such collector, on or before the first day of February then next ensuing.

Supervisors to Transmit Accounts to County Treasurer.

§ 38. As soon as the board of supervisors shall have sent or delivered the rolls, with such warrants annexed, to the collectors, they shall transmit to the treasurer of the county an account thereof, stating the names of the several collectors, the amount of money they are respectively to collect, the purposes for which the same are to be collected, and the persons to whom, and the time when the

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same are to be paid ; and the county treasurers, on receiving such account, shall charge to each collector, the sums to be collected by him.

Variation of Warrant in Cities.

[397] § 39. Wherever the laws respecting cities, shall have directed the monies assessed for any local purpose, to be paid to any person or officer other than those named in the preceding thirty-seventh section, the collector's warrant may be varied accordingly, so as to conform to such alteration.

Title III.

OF THE COLLECTION OF TAXES, THE DISPOSITION TO BE MADE OF THE MONIES COLLECTED, AND THE PROCEEDINGS IN RELATION TO UNPAID TAXES.

ARTICLE FIRST.

OF THE MANNER IN WHICH TAXES ARE TO BE COLLECTED, AND THE DUTIES OF THE COLLECTOR.

Collector to Call for Taxes.

SECTION 1. Every collector, upon receiving the tax-list and warrant, shall proceed to collect the taxes therein mentioned, and for that purpose shall call, at least, once, on the person taxed, or at the place of his usual residence, if in the town or ward for which such collector has been chosen, and shall demand payment of the taxes charged to him on his property.

Levy of Tax by Distress and Sale.

§ 2. In case any person shall refuse or neglect to pay the tax imposed on him, the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same, or of any goods and chattels in his possession, wheresoever the same may be found, within the district of the collector ; and no claim of prop-

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erty to be made thereto by any other person, shall be [398]
available to prevent a sale.

Notice of Sale of Goods Distrained.

§ 3. The collector shall give public notice of the time and place of sale, and of the property to be sold, at least six days previous to the sale, by advertisements to be posted up in, at least, three public places, in the town where such sale shall be made. The sale shall be by public auction.

Surplus Moneys Arising on Sale.

§ 4. If the property distrained shall be sold for more than the amount of the tax, the surplus shall be returned to the person in whose possession such property was, when the distress was made, if no claim be made to such surplus by any other person. If any other person shall claim such surplus, on the ground that the property sold belonged to him, and such claim be admitted by the person for whose tax the same was distrained, the surplus shall be paid to such owner; but if such claim be contested by the person for whose tax the property was distrained, the surplus monies shall be paid over by the collector to the supervisor of the town, who shall retain the same until the rights of the parties shall be determined by due course of law.

Proceedings in Case of Removal of Person Taxed.

§ 5. In case any person upon whom any tax now is, or hereafter shall be assessed, in any ward of any of the cities, or in any town within this state, shall have removed out of such ward or town, after such assessment, and before such tax ought by law to have been collected; or if any person shall neglect or refuse to pay any tax which now is, or hereafter shall be assessed in any ward of either of the said cities, or in any town, upon any estate of such person, situated out of the ward or town in which he

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shall reside, and within the county ; it shall be lawful, in either of those cases, for the collector of such ward or town, to levy and collect such tax of the goods and chattels of the person assessed, in any ward within the said cities, or in any town within the said county, to which such person shall have so removed, or in which he shall reside.

Collector to Pay Over Monies.

[399] § 6. Every collector shall, within one week after the time mentioned in his warrant, for paying the monies directed to be paid to the town officers of his town and to the county treasurer, pay to such town officers and county treasurer, the sums required in such warrant to be paid to them respectively, first retaining the compensation to which he may be legally entitled. The town officers to whom any such monies shall be paid, shall deliver to the collector duplicate receipts therefor, one of which duplicates shall be filed by the collector with the county treasurer, and shall entitle him to a credit, in the books of the county treasurer, for the amount therein stated to have been received ; and no other evidence of such payment shall be received by the county treasurer.

Surplus, how Disposed Of.

§ 7. Whenever any greater amount of taxes shall be assessed in any town than the town charges thereof, and its proportion of the state tax, and county charges, the surplus shall be paid by the collector to the county treasurer, who shall place it to the credit of such town, and the same shall go to the reduction of the tax of the succeeding year.

Tax on Part of Lot.

§ 8. The collector shall receive the tax on a part of any lot, piece or parcel of land, charged with taxes, provided the person paying such tax shall furnish a particular specification of such part ; and if the tax on the remainder of such

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lot, piece or parcel of land, shall remain unpaid, the collector shall enter such specification, in his return to the county treasurer, to the end that the part on which the tax remains unpaid, may be clearly known.

Tax on Undivided Share.

§ 9. If the part on which the tax shall be so paid, be an undivided share, then the person paying the same, shall state to the collector who is the owner of such share, that it may be accepted in case of a sale for the tax on the remainder. And the collector shall enter the name of such owner on his account of arrears of taxes.

Collector to Make Return of Unpaid Taxes.

§ 10. If any of the taxes mentioned in the tax-list annexed to his warrant shall remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the county treasurer an account of the taxes so remaining due; and upon making oath before the county treasurer, or in case of his absence, before any justice of the peace, that the sums mentioned in such account remain unpaid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels, belonging to, or in the possession of the persons charged with, or liable to pay such sums, wherein he could levy the same, he shall be credited by the county treasurer with the amount thereof.

Refusal of Collector to Serve.

§ 11. If any person chosen or appointed to the office of collector of any town or ward in this state, shall refuse to serve, or shall die, resign, or remove out of the town or ward, before he shall have entered upon or completed the duties of his office, or shall be disabled from completing the same, by reason of sickness or any other cause, the supervisor and any two justices of such town or ward, shall forthwith appoint a collector for the remainder of the year, who shall give the like security, and be subject

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to the like duties and penalties, and have the same powers and compensation, as the collector in whose place he was appointed; and the supervisor shall forthwith give notice of such appointment to the county treasurer. But such appointment shall not exonerate the former collector, or his sureties, from any liability incurred by him or them.

Warrant to Person Appointed.

[400] § 12. If a warrant shall have been issued by the board of supervisors prior to any appointment under the last section, the original warrant, if the same can be obtained, shall be delivered to the collector so appointed, and shall be considered as giving him the same powers as if originally issued to himself; but if such warrant can not be obtained, a new one shall be made out by the clerk of the board of supervisors of the county, which shall be directed to the collector so appointed. And upon every such appointment, the supervisor of the town or ward, if he shall think it necessary may extend the time limited for the collection of the taxes, for a period not exceeding thirty days; of which extension he shall forthwith give notice to the county treasurer.

Proceedings in Case Collector Neglects to Pay over Monies.

§ 13. If any collector shall refuse or neglect to pay to the several town officers of his town or to the county treasurer, the sums required by his warrant to be paid to them respectively, or either of them, or to account for the same as unpaid, the county treasurer shall, within twenty days after the time when such payments ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sums as shall remain unpaid and unaccounted for by such collector, of the goods and chattels, lands and tenements of such collector, and to pay the same to the county treasurer, and return such warrant within forty days after the

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date thereof ; which warrant the county treasurer shall immediately deliver to the sheriff of the county ; but no such warrant shall be issued by the county treasurer for the collection of monies payable to town officers, without proof, by the oath of such town officers, of the refusal or neglect of the collector to pay the same, or account therefor as above provided.

Execution of Warrant ; Disposition of Monies.

§ 14. The sheriff to whom such warrant is directed, shall immediately cause the same to be executed, and shall make return thereof to the county treasurer, within the time therein specified, and shall pay to him the money levied by virtue thereof, deducting for his fees the same compensation that the collector would have been entitled to retain. Such part of the monies collected, if any, as ought to have been paid by the collector to town officers, shall be paid by the county treasurer to the officers to whom the collector was directed to pay the same ; but if the whole amount of monies due from the collector, shall not be collected in such warrant, the county treasurer shall first retain the amount which ought to have been paid to him, before making any payment to the town officers.

Sheriff's Return.

§ 15. If the whole sum due from the collector shall be collected, the sheriff shall so state in his return ; but if a part only, or if no part of such sum shall be collected, the sheriff shall state in his return the amount levied, if any, exclusive of his fees, and shall also certify that such collector has no goods or chattels, lands or tenements, in his county, from which the monies, or the residue thereof, as the case may be, could be levied ; and in either case, the county treasurer shall forthwith give notice to the supervisor of the town or ward, of the amount due from such collector. [401]

Revised Statutes.

Collector's Bond, when to be Sued.

§ 16. The supervisors shall forthwith cause the bond of such collector to be put in suit, and shall be entitled to recover thereon the sum due from such collector, with costs of suit; and the monies recovered shall be applied and paid by the supervisor, in the same manner in which it was the duty of the collector to have applied and paid the same.

Where Sheriff Neglects to Make Return.

§ 17. If any sheriff shall neglect to return any such warrant, or to pay the money levied thereon, within the time limited for the return of such warrant; or shall make any other return than such as is above mentioned, the county treasurer shall forthwith proceed to collect, by attachment, the whole sum directed to be levied by such warrant.

Where County Treasurer Fails to Collect.

§ 18. In case the county treasurer shall fail to collect, such monies by attachment, he shall certify to the comptroller, that he has issued such warrant, stating its contents, that the sheriff has neglected to return the same, in the manner required by law, or to pay the money levied thereon, as the case may be, and that he has pursued the remedy, thereon, by attachment, without effect.

Where Sheriff to be Prosecuted.

§ 19. The comptroller shall give notice thereof to the attorney-general, who shall immediately prosecute such sheriff, and his sureties, for the sum due on such warrant; which sum, when collected, shall be paid to the treasurer of this state, and by him, on the comptroller's warrant, to the county treasurer.

Satisfaction of Collector's Bond.

§ 20. Upon the settlement of the amount of taxes, directed to be collected by any collector, in any of the towns

Revised Statutes.

or wards in this state, (the city of New York excepted), the county treasurer shall, if requested, give to such collector, or to any of his sureties, a satisfaction piece in writing, and shall acknowledge the same, before some person authorized to take acknowledgments of the satisfaction of judgments in courts of record.

Entry of Record of Satisfaction.

§ 21. Upon the production of such satisfaction piece, acknowledged as aforesaid, the clerk of the county shall enter satisfaction of record of the collector's bond, which shall thereby be discharged.

Fees for Acknowledgment.

§ 22. The officers taking and entering such acknowledgment of satisfaction, shall be entitled to the same fees as for taking and entering acknowledgment of satisfaction of a judgment in the courts of common pleas.

ARTICLE SECOND.

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OF THE PAYMENTS AND RETURNS TO BE MADE BY THE
COUNTY TREASURERS, AND THE DUTY OF THE COM-
PTROLLER, AND OTHER OFFICERS THEREUPON.

ARTICLE THIRD.

[407]

OF SALES FOR UNPAID TAXES, AND THE CONVEYANCE AND
REDEMPTION OF LAND SOLD.

[Articles two and three were repealed by chapter 298 of Laws of 1850 and a system of sales by County Treasurers substituted in place of sales by the Comptroller as directed by the Revised Statutes; the law of 1850 was in turn repealed by chapter 427 of 1855 and the provisions of article two and three of this chapter and title of the Revised Statutes were in substance re-enacted. See chapter 427 of 1855, *infra* page 33.]

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Title IV.

REGULATIONS CONCERNING THE ASSESSMENT OF TAXES ON
INCORPORATED COMPANIES, AND THE COMMUTATION OR
COLLECTION THEREOF.

(This Title is omitted as containing nothing material to
the present case.)

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Title V.

MISCELLANEOUS PROVISIONS OF A GENERAL NATURE.

Town and City Clerks to Certify Names of Assessors.

SECTION 1. The clerks of the cities of New York, Albany, Hudson, Schenectady and Troy, and the town clerks of the several towns, shall yearly, before the first day of October, in each year, certify and deliver to the supervisors of their respective towns, the names of all the assessors and collectors in their respective cities and towns, and the same shall be delivered to the board of supervisors, at their next meeting.

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Delinquencies of Clerks and Assessors.

§ 2. The boards of supervisors of the several counties, at every annual meeting, shall transmit to the comptroller the names and places of abode of the town clerks and assessors, in their respective counties, who shall have willfully refused or neglected to perform the duties required of them in this Chapter; and the comptroller shall thereupon give notice to the district attorneys of the proper counties, to the end that they may prosecute such delinquent town clerks and assessors, for the penalties incurred by them.

Securities Belonging to Residents of other States.

§ 3. When any bond, mortgage, note, contract, account or other demand, belonging to any person not being a

Revised Statutes.

resident of this state, shall be sent to this state for collection, or shall be deposited in this state for the same purpose, such property shall be exempt from taxation; and nothing contained in this Chapter shall be construed to render any agent of such owner liable to be assessed or taxed for such property; but every such agent shall be entitled to have any such property deducted from his assessment, upon making affidavit, before the assessors at the time appointed by them for renewing their assessments, that such property belongs to a non-resident owner, and therein specifying his name and residence.

Remedy by Tenant for Taxes Paid.

§ 4. When the tax on any real estate shall have been collected of any occupant or tenant, and any other person, by agreement, or otherwise, ought to pay such tax, or any part thereof, such occupant, or tenant, shall be entitled to recover, by action, the amount which such person ought to have paid; or to retain the same from any rent due, or accruing from him to such person, for the land so taxed.

Losses by Collector or County Treasurer.

§ 5. All losses which may be sustained by the default of the collector of any town or ward, shall be chargeable on such town or ward. All losses which may be sustained by the default of the treasurer of any county, in the discharge of the duties imposed by this Chapter, shall be chargeable on such county. And the several boards of supervisors shall add such losses, to the next year's taxes of such town or county.

Cancellation of Erroneous Charge for United States Direct Tax.

§ 6. Whenever it shall appear to the comptroller, that any charge of arrears of the direct tax of the United States, returned to his office as unpaid, has been paid to any of the collectors of that tax, or that the same lands have been

Revised Statutes.

twice charged with the same tax, he shall cancel the erroneous charge on the books of his office.

Comptroller May Require Corrected Returns of Non-resident Lands.

§ 7. If, in consequence of having received irregular and imperfect descriptions of the lands of non-residents in any town, the comptroller shall apprehend that irregular or imperfect returns may again be received, he may give notice of such apprehension to the board of supervisors of the proper county, at their annual meeting, specifying the several towns in such county, the returns from which will probably require correction.

Duty of Supervisors Thereupon.

[420] § 8. It shall be the duty of such board of supervisors to require the assessors and the collector of such town, specified in the notice of the comptroller, to meet in such town at such place as shall be designated by the supervisors, within thirty days of the expiration of the time, when the collectors are to make their returns to the county treasurers.

Duty of Assessors and Collectors.

§ 9. It shall be the duty of the assessors and collectors to meet pursuant to such requisition. The collectors shall specify to the assessors, the several lots to be returned as non-resident property, by reason of the non-payment of the taxes; and the assessors shall arrange the same according to the provisions of this Chapter, and shall examine the descriptions of the lots; and in case any of them are found erroneous or imperfect, they shall correct the same, conformable to such instructions as may have been received from the comptroller, and the collector shall thereupon return the lots as arranged and described by the assessors, to the county treasurer.

Revised Statutes.

Comptroller's Certificate or Deed.

§ 10. Every certificate or conveyance executed by the comptroller in pursuance of the provisions of this Chapter, may be recorded in the same manner, and with the like effect, as a deed regularly acknowledged or proved, before any officer authorized by law, to take the proof and acknowledgment of deeds.

Sales for Taxes for Opening Roads.

§ 11. All sales of lands charged with taxes in arrear for opening and improving roads within this state, shall be conducted in the manner hereinbefore prescribed; and the owners of the lands sold, shall be allowed to redeem within the same time, and on the same conditions.

Comptroller to Issue Blank Forms and Instructions.

§ 12. The comptroller shall, from time to time, at his discretion, transmit blank forms of assessment-rolls, and of returns of unpaid taxes, to the several county treasurers in this state; together with such instructions as he shall think useful, for the purpose of enforcing the uniform and proper execution of this Chapter.

Distribution of Forms and Instructions.

§ 13. The county treasurers shall distribute such of the said forms and instructions, as shall have been intended for the use of assessors, among the town clerks, in their respective counties, who shall deliver the same to the assessors in their respective towns. The county treasurer shall also transmit or deliver a copy of such forms and instructions to each of the assessors in any city in his county.

Copies of this Chapter to be Distributed.

§ 14. The comptroller shall, from time to time, whenever he shall find it to be necessary, cause to be printed, at the expense of this state, a sufficient number of copies

Laws of 1851, Chap. 176.

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of this Chapter, to furnish one copy to each county treasurer, supervisor, town clerk, assessor and collector within this state; and shall transmit to each county treasurer a sufficient number for his county. Every county treasurer receiving such copies, shall immediately transmit, at the expense of the county, to the clerk of each town therein, five copies, to be distributed by him among the officers entitled thereto; and he shall also transmit or deliver one such copy to each assessor and collector, in every city in his county.

Punishment for Neglect of Duty.

§ 15. If any of the officers concerned in the execution of this Chapter, shall willfully neglect or refuse to perform the duties assigned them, such officer shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both, in the discretion of the court.

Title VI.

SPECIAL AND LOCAL PROVISIONS.

(This Title is omitted as not relating to Franklin County.)

LAWS OF 1851, CHAPTER 176.

AN ACT to amend the law for the assessment and collection of taxes.

SECTION 1. Section two, article one, title two, chapter thirteen, part first of the Revised Statutes in relation to the assessment and collection of taxes, is hereby amended so as to read as follows: "Land occupied by a person other than the owner, may be assessed to the owner or occupant, or as non-resident lands."

SEC. 2. Section five of the same title is hereby amended so as to read as follows: "Every person shall be assessed in the town or ward where he resides when the assessment

Laws of 1851, Chap. 176.

is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property so held under either of these trusts, be assessed against any other person, and in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence for the purposes and within the meaning of this section, shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted, but the products of any state of the United States, consigned to agents in any town or ward of this state, for sale on commission, for the benefit of the owner thereof, shall not be assessed to such agent, nor shall such agents of moneyed corporations or capitalists be liable to taxation under this section, for any moneys in their possession or under their control transmitted to them for the purposes of investment or otherwise."

SEC. 3. Sections fifteen, sixteen, twenty-two, twenty-three, twenty-four, twenty-five and twenty-six of the same title are hereby repealed, and section seventeen of the same title is hereby amended so as to read as follows: "All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

SEC. 4. Section twenty of the same title is hereby amended so as to read as follows: Such notices shall set forth that the assessors have completed their assessment-roll, and that a copy thereof is left with one of their number at a place to be specified therein, where the same may be seen and examined by any person interested, until the third Tuesday of August; and that on that day the assessors will meet at a time and place also to be specified in such notice, to review their assessments. On the application of any person conceiving himself aggrieved, it

shall be the duty of the said assessors on such day to meet at the time and place specified, and hear and examine all complaints in relation to such assessments that may be brought before them; and they are hereby empowered, and it shall be their duty to adjourn from time to time, as may be necessary, to hear and determine such complaints; but in the several cities of this state, the notices, required by this section, may conform to the requirements of the respective laws regulating the time place and manner for revising the assessments in said cities, in all cases where a different time, place, and manner is prescribed by said laws from that mentioned in this act.

Penalty for Neglect.

§ 5. If the assessors shall willfully neglect to hold the meeting specified in the last preceding section,* each assessor so neglecting shall be liable to a penalty of twenty dollars, to be sued for and recovered before any court having jurisdiction thereof, by the supervisor of the town, for the use of the poor of the same town; and in case of such neglect to meet for review, any person aggrieved by the assessment of the assessors may appeal to the board of supervisors, at their next meeting, who shall have power to review and correct such assessment.

Reduction of Valuation.

§ 6. Whenever any person on his own behalf, or on behalf of those whom he may represent, shall apply to the assessors of any town or ward to reduce the value of his real and personal estate, as set down in the assessment-roll, it shall be the duty of such assessors to examine such person under oath touching the value of his or their said real or personal estate; and after such examination, and such other supplementary evidence, under oath, as shall be presented by the party or person aggrieved, they shall fix the value thereof at such sum as they may deem just, under

[* Section 20, part 1, ch. 13, tit. 2, R. S.]

the rule prescribed by section* of this title; but if such person shall refuse to answer any question as to the value of his real or personal estate, or the amount thereof, or present sufficient supplementary evidence, under oath, to justify a reduction, the said assessors shall not reduce the value of such real or personal estate. The examination so taken shall be written, and shall be subscribed by the person examined, and shall be filed in the office of the town clerk of the town or city in which such assessment shall be made; and any person who shall willfully swear false on such examination before the assessors, shall be deemed guilty of willful and corrupt perjury. It shall also be the duty of the assessors, whenever the valuation fixed to* them, after such examination, shall exceed that sworn to by the aggrieved party or person, to indorse on the written examination, the words, "disagreed to by the undersigned assessors, under the rule prescribed for making assessments, by section fifteen, article two, title two, chapter thirteen, part one of the revised statutes, and in view of the obligations imposed by the deposition and oath, subscribed and made on the completion of the assessment-roll, to which this disagreement refers." It shall be the duty of the assessors on the same occasion, to furnish the aggrieved party or person a duplicate copy of the before mentioned written examination, together with the indorsement of disagreement aforesaid, duly signed.

Assessors May Administer Oaths.

§ 7. The assessors of the several towns and wards of this state, shall have power to administer oaths to any person applying to them under the provisions of the sixth section of this act.

Assessment-Roll, Form of Oath To.

§ 8. When the assessors or a majority of them, shall have completed their roll, they shall severally appear be-

[* So in original. As amended by L. 1857, ch. 536.]

Laws of 1851, Chap. 176.

fore one of the justices of the town or city in which they shall reside, and shall severally make and subscribe before such justice, an oath, in the following form : We, the undersigned, do severally depose and swear that we have set down, in the foregoing assessment-roll, all the real estate situated in the (town or ward as the case may be), according to our best information ; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor ; and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such persons respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full and true value thereof, according to our best judgment and belief. Which oath shall be written on said roll, signed by the assessors, and certified by the justice, and shall be in place of the official certificate now required by law ; and every assessor who shall willfully swear false in taking and subscribing said oath, shall be deemed guilty of, and liable to the penalties, of willful and corrupt perjury.

LAWS 1855, CHAP. 427.

AN ACT in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes.

Title I.

OF THE PAYMENTS AND RETURNS TO BE MADE BY THE COUNTY TREASURER, AND THE DUTY OF THE COMPTROLLER AND OTHER OFFICERS THEREUPON.

Treasurer to Pay County Debts.

§ 1. The treasurer of each county shall pay to the creditors of his county, from the moneys paid to him by the collectors, such sums, and in such manner as the board of supervisors shall have directed.

State Tax, When to be Paid.

§ 2. The several county treasurers shall, on or before the first day of March in each year, pay to the treasurer of this state, the amount of the state tax, if any, raised and paid over to them respectively, retaining the compensation to which they may be entitled.

How Paid.

§ 3. Such payment may also be made by depositing such money, to the credit of the treasurer of this state, in such banks in the cities of New York or Albany as shall have been designated by the comptroller, and shall then be entitled to receive the state deposits, and in case of such payment to either of those banks, the county treasurer making it, shall forthwith transmit a certificate of deposit to the comptroller, who shall thereupon certify such payment to the state treasurer, and charge him with the amount thereof.

Laws of 1855, Chap. 427.

Certificate of Unpaid Taxes.

§ 4. Whenever any county treasurer shall receive from a collector an account of unpaid taxes assessed on lands of non-residents, such county treasurer shall compare the same with the original assessment-roll, which original rolls the collectors are required in all cases to return and deposit with their respective county treasurers; and if he finds it to be a true transcript thereof, he shall add to it a certificate showing that he has examined and compared the account with the assessment-roll, and found the same to be correct; and after crediting the collector with the amount, shall, before the first day of April next ensuing, transmit the account and collector's affidavit, to the comptroller, with a certificate that he has compared the account with the entries of the same taxes, in the original assessment roll, and has found the same to be a true transcript of such roll.

Tax on Land Vacant by Removal of Occupant.

§ 5. If the taxes on any farm or lot of land, assessed to a resident, shall be returned as unpaid, in consequence of such premises becoming vacant by the removal of the occupant, before the collection of the tax imposed thereon, or in default of goods and chattels of the occupant to satisfy such tax, the supervisor of the town in which such land was assessed, shall add a description thereof to the assessment-roll of the next year in the part thereof appropriated to taxes on lands of non-residents, and shall charge the same with the uncollected tax of the preceding year; and the same proceedings shall be had thereon, in all respects, as if it was the land of a non-resident, and as if such tax had been laid in the year in which the description is so added.

Laws of 1855, Chap. 427.

Non-resident Lands.

§ 6. Whenever the taxes upon the lands of a resident shall be returned for non-payment, as provided in the last preceding section, to the county treasurer, the collector shall annex to such return an affidavit, stating the reasons why such tax was not collected. Nothing in said last preceding section shall be so construed as to conflict with sections one, two and three of chapter four hundred and sixty-one, laws of eighteen hundred and thirty-six, but they shall be concurrent remedies.

Tax may be Paid to County Treasurer.

§ 7. Any person whose lands are assessed, may pay the tax assessed thereon to the treasurer of the county in which such lands were assessed, provided such payment be made to the county treasurer before he shall have made his annual return of the arrears of taxes to the comptroller. The county treasurer shall give a receipt for such payment, and shall also make return thereof to the comptroller.

Apportionment of State Tax.

§ 8. The comptroller shall, from the annual returns made to him of the valuations of real and personal estates in the several counties in this state, charge the several county treasurers with the amount of the state taxes, if any, to be raised in their respective counties, crediting them with their own fees; but no fees shall be allowed by the comptroller to the county treasurers, in adjusting the accounts of the county treasurers, for such portion of the state tax as is paid by credit given for taxes on non-resident property returned to him.

Lands Imperfectly Described.

§ 9. Whenever any account of arrears of taxes on the lands of non-residents shall be transmitted by a county treasurer to the comptroller, he shall examine them, and

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reject all taxes that shall be found to be charged on lands imperfectly described, and credit such county treasurer, in a book to be kept by the comptroller for that purpose, with the amount of all arrears of taxes which shall be admitted by him.

[Amended by L. 1878, ch. 152; page 66 *infra*.]

Arrears, how Adjusted with County.

§ 10. If the arrears so credited to the treasurer of any county shall exceed the state tax, if any, in said county, the comptroller shall cause the surplus, after deducting therefrom any balance which may be due from such county on account of taxes previously rejected by the comptroller, to be paid out of the treasury of this state, to the treasurer of the county; and the whole amount of taxes so to be assumed by the state, shall be collected for its benefit, in the manner hereinafter provided. If there be no state tax, the whole amount of such arrears, after deducting such balance as above mentioned, shall be paid to the county treasurer.

Accounts with County Treasurer.

§ 11. The comptroller shall state the accounts of the several county treasurers, on the first day of May in every year; and whenever any part of a state tax shall appear to be unpaid by any county treasurer, the comptroller shall transmit by mail to such county treasurer a copy of his account, requiring him to pay the balance within thirty days.

Proceedings on Failure of County Treasurer to Settle.

§ 12. If any county treasurer shall refuse or neglect to pay such balance within such time, the comptroller shall forthwith, (unless he shall be satisfied by due proof that such treasurer has not received such balance, and has taken all proper steps to collect the same,) deliver a copy of such

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county treasurer's account to the attorney-general, who shall prosecute forthwith; and the state shall be entitled to recover the balance due, with interest thereon, from the first day of May, in the year when the same ought to have been paid.

Treasurer's Bond to be Sued.

§ 13. The comptroller may also, in his discretion, direct the board of supervisors of the proper county, to institute one or more suits on the bond of such treasurer and his sureties.

When Suits to be Discontinued.

§ 14. If the defendants in any suits to be brought under either of the last two preceding sections, shall at any time before judgment is obtained therein, pay the balance due the state, with interest, into the treasury, or account for the same to the comptroller, it shall be his duty, on payment of costs of suit, to direct such suits to be discontinued.

Statement of Arrears.

§ 15. It shall be the duty of the comptroller, on or before the first Tuesday in October, in every year, to furnish the boards of supervisors of the several counties, from which returns of arrears of taxes shall have been received at his office, with statements of the sums paid out of the state treasury, to their respective county treasurers, on account of such arrears during the year preceding.

Rejected Taxes, Statement of.

§ 16. The comptroller shall, on or before the first day of September in each year, transmit by mail or otherwise, to each county treasurer, a transcript of the taxes of the preceding year, assessed in any town of such county, which shall have been rejected by him, for any cause whatever, stating therein the cause of such rejection.

[Amended by L. 1878, ch. 152; page 67 *infra*.]

Taxes on Lands Imperfectly Described.

§ 17. Whenever the comptroller, after having transmitted such annual transcript, shall discover that any taxes credited to a county in the books of his office have been assessed on lands so imperfectly described, that the same can not, in his opinion, be located with certainty, he shall charge such taxes to the treasurer of the county in which such lands shall be, with the interest thereon, from the first day of March, in the year following that in which the taxes were laid, to the first day of February next after the discovery of such imperfect description.

[Amended by L. 1878, chap. 152 : page 67 *infra*.]

Transcript to be Delivered to Supervisors.

§ 18. The comptroller shall also transmit, by mail, a transcript of the returns of such taxes, with the addition of such interest, to the proper county treasurer, who shall deliver the same to the supervisor of the town upon which such taxes are to be assessed, by whom it shall be delivered to the board of supervisors, at their next meeting. If the town upon which such taxes were originally assessed, shall have been divided since such assessment, the county treasurer shall deliver such transcript to the board of supervisors at their next meeting.

[Amended by L. 1878, ch. 152 : page 67 *infra*.]

Description of Lands to be Made.

§ 19. Whenever the comptroller shall have rejected any tax, in the first instance, or have charged the same to a county, to which it shall have been credited, on account of any inaccurate or imperfect description of the lands on which such tax was laid, the supervisor of the town in which such lands are situate, shall, if in his power, add to the next assessment-roll of such town an accurate description of such lands ; and if necessary, may cause the survey of such lands at the expense of the town ; and the board of supervisors shall charge them with the taxes

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and interest in arrears, stating the tax of each year separately, and shall direct the collection thereof ; and such taxes and interest shall, for all the purposes of this act, be considered as the taxes of the year in which the description shall be perfected.

[Amended by L. 1878, ch. 152 : page 68 *infra*.]

If not Made, Tax Assessed on Town.

§ 20. If an accurate description of such lands shall not have been added by such supervisor to the assessment-roll of his town, the board of supervisors shall cause such arrears of taxes, and the interest thereon, to be levied on the valuations of the estates, real and personal, of such town, as appearing by such assessment-roll, and shall direct the same to be collected with the other taxes of the same year.

[Amended by L. 1878, ch. 152 : page 68 *infra*.]

How Assessed in Case of Division of Town.

§ 21. If the town in which such taxes were originally assessed, shall have been divided since such assessment, then such taxes and interest shall be apportioned by the board of supervisors among the towns included in the limits of such original towns, in such equitable manner as they may deem proper.

[Amended by L. 1878, ch. 152 : page 69 *infra*.]

Tax, when Canceled.

§ 22. Whenever it shall be made to appear to the comptroller that any tax returned as unpaid was, previously to such return, paid to the collector or county treasurer, the comptroller shall cancel such tax on the books of his office ; and if the same shall have been also paid into the state treasury, he shall cause it to be repaid out of the treasury, to the person by whom such payment shall have been made.

[Amended by L. 1885, ch. 453 : page 81 *infra*.]

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Account to be Transmitted to Supervisors.

§ 23. Whenever any tax shall be so canceled by the comptroller, he shall transmit an account thereof to the treasurer of the proper county, who shall cause the same to be laid before the board of supervisors thereof, and the amount of such tax with the interest shall be collected by them of the collector or county treasurer, who made such erroneous returns, and be paid into the treasury of this state.

Overpaid Taxes.

§ 24. Whenever it shall appear satisfactorily to the comptroller that the amount of any tax has been paid, and afterwards other money has been paid into the treasury of this state, on account of such tax; and in cases where it shall appear that the amount due for any tax has been overpaid, he may draw his warrant on the treasurer for the amount so overpaid, in favor of the person who may have made such payment.

Losses by Default.

§ 25. All losses which may be sustained by the default of the collector of any town or ward, shall be chargeable on such town or ward. All losses which may be sustained by the default of the treasurer of any county in the discharge of the duties imposed by this act, shall be chargeable to such county. And the several boards of supervisors shall add such losses to the next year's taxes of such town or county.

Interest on Unpaid Taxes.

§ 26. If any tax charged on lands of non-residents, or lands returned as under section five of this act, shall remain unpaid until the first day of August following the year in which they shall have been assessed, they shall thereafter be subject to a yearly interest, at the rate of ten

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per cent., until the same shall be duly paid or the lands sold, as hereinafter provided.

Certificate of Taxes Due.

§ 27. The comptroller shall, from time to time, give to any person requiring the same, a certificate of the amount of any tax, interest and charges, due on any tract, piece or parcel of land; and the state treasurer may receive such tax, interest and charges, and give a receipt therefor upon such certificate, which shall be countersigned by the comptroller, and entered in the books of his office.

[Amended by L. 1878, ch. 152 : page 69 *infra*.]

Persons may Pay Tax for their Interest in Lands.

§ 28. Whenever a sum in gross is assessed upon any tract, piece or lot of land, any person claiming a divided or undivided part thereof, may pay to the treasurer of the state any part of the tax, interest, and charges due thereon, proportionate to the number of acres claimed by him, on the certificate of the comptroller; and the remaining tax, interest and charges shall be a lien on the residue of the land only.

Map of Subdivisions.

§ 29. If the tract be subdivided, the person wishing to pay the tax upon a divided part of it, shall deliver to the comptroller a map of the subdivisions, if required by him.

Taxes, how Paid : Overcharges.

§ 30. Any person may pay the tax for any one year, and the interest and charges thereon, on any tract or lot of land, without paying the tax of any other year; and in case any tract or lot of land shall have been returned as containing a greater quantity of land than it shall actually contain, the amount overcharged shall be deducted, or if the tax shall have been paid according to such return, shall be re-

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funded out of the treasury, on satisfactory proof being produced to the comptroller of the quantity actually contained in such tract or lot, at any time before the sale of such lands; but no such overcharge shall be cancelled, nor shall such over-payments be refunded unless application shall be made to the comptroller therefor within six years after the assessment of such overcharge.

Overcharges to be Recharged to County.

§ 31. If the whole amount of the tax, in case of the such overcharge, shall have been paid to the county treasurer, out of the treasury of this state, the comptroller shall charge the amount so refunded, with interest and charges thereon, to the treasurer of the county from which the tax was returned, and shall transmit an account thereof to him.

Town to be Liable Therefor.

§ 32. Such county treasurer shall deliver such account to the board of supervisors, at their then next meeting, who shall cause the amount thereof to be added to the proportion of the charges of the county to be raised in the town in which the tax was laid.

TITLE II.

OF SALES FOR UNPAID TAXES, AND THE CONVEYANCE AND REDEMPTION OF LAND SOLD, ETC.

When Land to be Sold.

§ 33. Whenever any tax charged on lands returned to the comptroller, and the interest thereon, shall remain unpaid for two years from the first day of May following the year in which the same was assessed, the comptroller shall proceed to advertise and sell such land in the manner hereinafter provided.

[Amended by L. 1878, ch. 152; page 69 *infra*.]

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List of Lands and Notice of Sale.

§ 34. He shall make out a list or statement of the lands charged with such tax and interest, and so liable to be sold; and shall cause so many copies thereof to be printed, as shall be sufficient to furnish each county treasurer with at least five copies, and each town clerk with at least two copies, and shall transmit to each county treasurer such number of said copies as shall be equal to five copies for such county treasurer, and two copies for each town clerk in his county. And the comptroller shall also make and transmit to the county treasurer of each county, a list or statement of all the lands in such county charged with such tax and interest, who, in addition to publication in the state paper, shall cause the same to be correctly published and printed in each of the papers in his county designated by the board of supervisors for publishing the session laws, for the space of ten weeks prior to the commencement of such sale. If no newspaper shall have been designated to print the laws in any county, such list or statement shall be published in two newspapers of such county to be selected by the county treasurer; and if there shall not be two newspapers published in such county, then in two papers which the county treasurer shall ascertain to be most generally circulated in such county. But no error in the printed description in such newspapers shall vitiate or in any manner affect the validity of such sale; and all expenses of printing such list or statement shall be audited by the comptroller and paid out of the treasury of this state, on receiving one copy of the newspaper containing the same, with an affidavit of the publication of such list or statement according to the provisions of this section, to be made by the printer, publisher, or some person to whom the fact of such publication shall be known.

[Amended by L. 1878, ch. 152: page 69, *infra*.]

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List, how Transmitted.

§ 35. The comptroller may employ agents or messengers to transmit to such of the county treasurers as he may think proper, the copies of such lists of lands liable to be sold for taxes ; and the agents or messengers so employed shall require of each county treasurer to whom they shall deliver such copies, an acknowledgment, in writing, of the receipt thereof ; which acknowledgments shall be delivered by such agents or messengers to the comptroller, at least eighteen weeks before the commencement of the sale of the lands mentioned in such lists.

Compensation of Agents.

§ 36. The reasonable compensation of such agents or messengers shall be fixed by the comptroller, and paid out of the treasury ; but the same shall not, in any case, exceed the amount of postage which would have been charged on the copies transmitted by such agents or messengers, if they had been transmitted by mail.

Expenses, how Charged.

§ 37. The expenses incurred by the state in printing and transmitting any list of lands liable to be sold for taxes, and in publishing notices of sale, shall be charged on the lands mentioned in said list, and shall be apportioned among the several tracts or parcels of such land, in such proportions as the Comptroller shall deem just.

[Amended by L. 1878, ch. 152 : page 70, *infra*.]

Copies in County Treasurer's Office.

§ 38. The county treasurers shall retain in their offices five of the copies transmitted to them, and shall permit all persons, at all reasonable hours, to examine the same ; and shall cause the remaining copies to be delivered to the town clerks.

[Amended by L. 1878, ch. 152 : page 71, *infra*.]

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County Treasurer's Expenses.

§ 39. The expenses which may be incurred by the county treasurer, in the transmission of such lists, shall be audited and paid as contingent expenses of the county.

Notice by Town Clerks.

§ 40. Every town clerk to whom such copies shall be delivered, shall give notice at the opening of every town meeting for the election of town officers, that lists of all lands advertised for sale for taxes by the comptroller, are deposited in his office, and that they may be there seen and examined, at all reasonable hours, free of expense.

General Notice to be Published.

§ 41. After transmitting such lists to the county treasurers, the comptroller shall cause to be published, once in each week, for twelve weeks successively, in all the newspapers in this state, designated by the board of supervisors of the several counties for printing the laws, under the provisions of the act, entitled "An act for the publication of the session laws in two newspapers in each county in this state," passed May fourteenth, one thousand eight hundred and forty-five, a general notice, stating that a list of all the lands liable to be sold for taxes has been forwarded to each of the county treasurers and town clerks in this state, and that so much of the said lands as may be necessary to discharge the taxes, interest, and charges which may be due thereon at the time of sale, will, on the day to be mentioned in such notice, and the succeeding days, be sold at public auction at the capitol in the City of Albany.

[Amended by L. 1878, ch. 152; page 71, *infra*.]

Affidavit of Publication.

§ 42. Every printer to whom such notice shall be transmitted for publication, shall, within twenty days after the last publication thereof, transmit to the comptroller an af-

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fidavit of due publication, made by some person to whom the fact of publication shall be known.

Maps of Lands Sold.

§ 43. Whenever the comptroller, preparatory to a sale of lands for taxes, shall deem it necessary, in order to test the correctness of the descriptions thereof, he may apply to the board of supervisors of any county, for maps of any tracts of land charged with taxes, and returned from such county. And the board of supervisors to whom such application shall be made, shall furnish such maps, at the expense of the county, if they can be procured, and if not, they shall then furnish such descriptions of the lands as they can obtain, with a statement of the quantity in each subdivision, if the same be divided.

[Amended by L. 1881, ch. 402 : page 72, *infra*.]

Sale by Comptroller.

§ 44. On the day mentioned in the notices, the comptroller shall commence the sale of such lands, and shall continue the same from day to day, until so much of each parcel so assessed, shall be sold, as will be sufficient to pay the taxes, interest and charges thereon.

[Amended by L. 1881, ch. 402 : page 73, *infra*.]

Payment by Purchaser : Default.

§ 45. The purchasers at such sale shall pay the amount of their respective bids to the state treasurer, within forty-eight hours after the last day of the sale ; and if any such purchaser shall refuse or neglect to pay the same within that time, the comptroller may state an account against him, and deliver it to the attorney-general, who shall be entitled to recover the same from the purchaser, by an action in the name of the people of this state ; and for that purpose he shall forthwith cause a suit to be instituted therefor ; or the comptroller may, in his discretion, re-sell the said lands upon which such bids so remaining unpaid were made, as hereinafter provided.

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Certificate of Purchase.

§ 46. After such payment shall have been made, the comptroller shall give to the purchaser of any such lands a certificate in writing, describing the lands purchased, the sum paid, and the time when the purchaser will be entitled to a deed.

Cancellation of Sale for Non-payment.

§ 47. At any time after the expiration of three months from the conclusion of any sale of lands for taxes, pursuant to this act, when any purchaser at such sale shall not have paid the amount of his bid, or the same shall not have been collected from him, it shall be lawful for the comptroller to cancel such sale, by which all the rights of the said purchaser under such bid shall be extinguished.

New Certificate May be Issued.

§ 48. When the comptroller shall have cancelled any sale in the manner above provided, he may issue a certificate of such sale to any other person who will pay the amount for such certificate which would be payable by the original purchaser, in case the said sale had not been cancelled, or if such certificate cannot be sold, he may transfer the same to the people of the state.

[Amended by L. 1878, ch. 152 and L. 1881, ch. 402 : pages 71 and 74 *infra*.]

Rights of New Purchaser.

§ 49. The change of purchaser shall be noted in the sales book, and the time when made; and the certificate issued to such new purchaser, shall confer the same right to him and his legal representatives, as he would have acquired had he been the successful bidder at the sale.

Time for Redemption.

§ 50. The owner or occupant of any land sold for taxes, or any other person, may redeem the same, as

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hereinafter provided, at any time within two years after the last day of such sale, by paying to the state treasurer, on the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest at the rate of ten per cent. per annum, from the date of such certificate.

[Amended by L. 1881, ch. 402 : page 75, *infra*.]

Redemption of Undivided Parts.

§ 51. Any person claiming an undivided part of any tract, lot or piece of land sold for taxes, may redeem the same on paying as aforesaid, such proportion of the purchase money and interest as he shall claim of the lands sold.

Undivided Share of Undivided Parts.

§ 52. Any person claiming an undivided share in any tract or lot of land out of which an undivided part shall have been sold for taxes, may redeem his undivided share by paying as aforesaid, such proportion of the purchase money and interest as he shall claim of the lands sold.

Redemption of Specific Parts.

§ 53. Any person claiming a specific part of any tract, lot or piece of land sold for taxes, may redeem his specific part by paying as aforesaid, such proportion of the purchase money and interest as his quantity of acres shall bear to the whole quantity of acres sold.

Specific Parts of Undivided Tract.

§ 54. Any person claiming a specific part of any tract or lot of land out of which an undivided part shall have been sold for taxes, charged on the whole tract or lot, may redeem his specific part by paying as aforesaid, such proportion of the purchase money and interest as his quantity of acres shall bear to the whole quantity taxed.

Proportional Parts: Effect of Payment For.

§ 55. Any person claiming a specific part of any tract or lot of land out of which a specific part belonging to some other person, shall have been sold for taxes charged on the whole tract or lot, may exonerate himself from all liability to contribute to the owner of the part sold, by paying as aforesaid, at any time before the expiration of the time allowed for the redemption, such proportion of the purchase money and interest as his quantity of acres shall bear to the whole quantity taxed; and such payment shall operate as redemption of a proportionate part, according to the amount paid, of the land sold.

Partial Redemptions.

§ 56. In every case of a partial redemption, pursuant to either of the last five sections, the quantity sold shall be reduced in proportion to the amount paid on such partial redemption; and the comptroller shall convey accordingly.

Taxes on Lands Conjointly Sold.

§ 57. Whenever the lands of any one person shall be sold for taxes assessed conjointly on the lands of such person and the lands of another person, and such other person shall not pay his due proportion under section fifty-two of this act, the person whose lands shall be sold may redeem the same on paying, as aforesaid, the purchase money and interest; and he shall be entitled to recover from such other person whose lands were assessed with his, a just proportion of the redemption moneys so paid, with lawful interest from the time of such redemption; but no suit shall be brought for the recovery of such proportion, until after the expiration of the time allowed for redemption.

Suits for Proportion of Value.

§ 58. If such owner shall not redeem the land sold, and the same shall be conveyed by the comptroller, such owner

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may recover from such other person the same proportion of the value of the land sold and conveyed, that he ought to have paid of the tax, interest and charges for which the land shall have been sold. In all actions under this or the last preceding section, the certificate of the state treasurer, countersigned by the comptroller, duly stating the facts in relation to such redemption or sale and conveyance, shall be presumptive evidence of such payment, and of all facts therein stated.

Lien of Judgment.

§ 59. Every judgment obtained under either of the last two sections, shall have priority, as against the lands of the defendant therein, on which the tax was assessed, and for which such proportional part ought to have been paid, to all mortgages executed, and all judgments recovered, since the twenty-third day of April, eighteen hundred and twenty-three.

Docket, how Made.

§ 60. But such judgment shall not be entitled to such priority, unless at the time of docketing the same the plaintiff cause an entry to be made by the clerk in the docket thereof, specifying that such judgment has priority, as a lien on certain lands, over mortgages and other judgments pursuant to the laws regulating the collection of taxes, which entry shall be a part of such docket.

Notice of Unredeemed Lands.

§ 61. The comptroller shall, at least six months before the expiration of the two years allowed for redemption, prepare a notice for each county, in which there shall then appear to be any lands sold for taxes and unredeemed, specifying particularly every parcel remaining unredeemed, and the amount necessary to redeem the same, calculated to the last day on which such redemption can be made, and stating that unless such lands are

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redeemed by a certain day, they will be conveyed to the purchaser; and he shall cause such notice to be published once in each week, for at least six weeks successively, in the newspapers designated by the boards of supervisors of such counties respectively to publish the session laws; such publication to be in the body of the newspaper, and not in a supplement; and the said six weeks' publication to be completed at least eighteen weeks before the expiration of the two years allowed for the redemption. The boards of supervisors of the respective counties shall audit and pay the expenses of such publication.

Where no Newspapers Designated.

§ 62. If no newspapers shall have been designated to print the laws in any county in which such lands are situated, such notices, and lists or statements, shall be transmitted and published, as above provided, in two newspapers of such county, to be selected by the comptroller; and if there shall not be two newspapers published in such county, then in the two newspapers which the comptroller shall believe to be most generally circulated in such county.

Deeds to be Executed of Lands Unredeemed.

§ 63. If no person shall redeem such lands within such two years, the comptroller shall, at the expiration thereof, execute to the purchaser, his heirs or assigns, in the name of the people of this state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple; subject, however, to all the claims which the people of this state may have thereon for taxes, or other liens or incumbrances.

Lost Certificate.

§ 64. Whenever any certificate, given by the comptroller for lands sold for taxes, shall be lost, or wrongfully with-

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held by any person from the owner thereof, the comptroller may receive evidence of such loss or wrongful detention, and on satisfactory proof of the fact, may execute and deliver a deed to such person, as may appear to him to be the rightful owner of the land described in the certificate.

Conveyances, how Executed : Effect Of.

§ 65. Such conveyance, shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, surveyor general or treasurer, and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes, shall be presumptive evidence that the sale, and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto.

[Amended by L. 1860, ch. 209 and L. 1885, ch. 448 ; pages 61 and 78, *infra*.]

Bids for the State.

§ 66. It shall be the duty of the comptroller to bid in for the state, at any sale of land for taxes, every lot of land by him put up for which no person shall offer to bid ; and certificates of such sale shall be made by the comptroller, which shall describe the lands purchased, and specify the time when the people of this state will be entitled to a deed. Such purchases shall be subject to the same right of redemption as purchases by individuals ; and if the lands sold shall not be redeemed, the comptroller, shall execute a release therefor, to the people of this state, or their assignees, which shall have the same effect, and become absolute in the same time, and on the performance of the like conditions, as in the case of sales and conveyances to individuals.

[Amended by L. 1881, ch. 402 ; page 76, *infra*.]

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Sale of Lands Bid in by the Comptroller.

§ 67. At any time before the expiration of the two years allowed to redeem, the comptroller may sell and assign all the interest of the people of this state, in any or all such certificates as mentioned in the last preceding section, either at public or private sale, as to him may seem most for the interest of the people, to any person who shall forthwith pay into the state treasury the amount of the purchase money charged him by the comptroller; and the assignee of such certificate, if the lands therein described shall not be redeemed, shall be entitled to a deed therefor, which shall have the same effect, and become absolute in the same time, and on the performance of the like conditions, as in the case of conveyances under the last preceding section.

Notice to Occupants.

§ 68. Whenever any lot or separate tract of land sold for taxes by the comptroller, and conveyed as hereinbefore provided, shall, at the time of the expiration of the two years given for the redemption thereof, or any part thereof, be in the actual occupancy of any person, the grantee to whom the same shall have been conveyed, or the person claiming under him, shall serve a written notice on the person occupying such land, within two years from the expiration of said time to redeem; stating in substance the sale and conveyance, the person to whom made, and the amount of the consideration money mentioned in the conveyance, with the addition of thirty-seven and a half per cent. on such amount, and further addition of the sum paid for the deed; and stating also, that unless such consideration money and the said thirty-seven and a half per cent., together with the sum paid for the deed, shall be paid into the treasury for the benefit of such grantee, within six months after the time of filing in the comptroller's office of the evidence of the service of the said notice, that the said conveyance will become absolute, and the occupant

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and all others interested in the land, be forever barred from all right or title thereto. And no conveyance made in pursuance of this section shall be recorded, until the expiration of such notice, and the evidence of the service of such notice shall be recorded with such conveyance.

Notice, how Served.

§ 69. Such notice may be served personally, or by leaving the same at the dwelling-house of the occupant, with any person of suitable age and discretion, belonging to his family.

Redemption by Occupant.

§ 70. The occupant, or any other person, may, at any time within the six months mentioned in such notice, redeem the said land, by paying into the treasury, such consideration money, with the addition of thirty-seven and a half per cent. thereon, and the amount that shall have been paid for the deed; and every such redemption shall be as effectual as if made before the expiration of the two years allowed to redeem the land sold.

Certificate of Redemption.

§ 71. Upon such redemption, as provided for in the last preceding section, the comptroller shall give to the person redeeming, a certificate under his hand and seal, stating the payment, the year in which the sale was made, and showing particularly what land such payment is intended to redeem; and such certificate shall be evidence of such redemption, and may be recorded by the clerk of the county, in the book for the recording of deeds.

Affidavit of Service of Notice.

§ 72. In every case of actual occupancy, the grantee, or the person claiming under him, in order to complete his title to the land conveyed, shall within one month after the service of such notice, file with the comptroller a copy of

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the notice served, together with the affidavit of some person who shall be certified as credible, by the officer before whom such affidavit shall be taken, that such notice as is above required, was duly served, specifying the mode of service.

Comptroller's Certificate of Facts.

§ 73. If the comptroller shall be satisfied by such copy and affidavit that the proper notice has been duly served, and if the moneys required to be paid for the redemption of such land shall not have been paid, as hereinbefore provided, he shall, under his hand and seal, certify such facts, and the conveyance before made shall thereupon become absolute; and the occupant, and all others interested in said lands shall be forever barred of all right and title thereto.

Occupant May Redeem.

§ 74. The occupant of any such lot, or any other person may at any time before the service of said notice by the purchaser, or the person claiming under him, redeem any lands so occupied, by filing in the office of the comptroller satisfactory evidence of the occupancy required, and by paying to him the consideration money for which the lands to be redeemed were sold, and thirty-seven and a half per cent thereon together with the sum paid for the deed, if any.

[Amended by L. 1885, ch. 453 and by L. 1890, ch. 556; pages 83 and 84, *infra*.]

Treasurer's Receipt, Comptroller's Certificate to be Evidence.

§ 75. Upon redemption being made, as permitted in the last preceding section, the receipt of the treasurer to whom the payment is made, accompanied by the comptroller's certificate, as required by section sixty-eight of this act, and further stating, that such redemption was made without notice, shall be presumptive evidence that such land has been correctly redeemed.

Effect of Sale on Mortgage Lien.

§ 76. No sale of real estate hereafter made for the non-payment of any tax or assessment, shall destroy, or in any manner affect the lien of any mortgage thereon, duly recorded or registered at the time of such sale, except as hereinafter provided.

Notice to Mortgagee.

§ 77. It shall be the duty of the purchaser at such sale, to give to the mortgagee a written notice of such sale, requiring him to pay the amount of the purchase money, with interest, at the rate allowed by law thereon, within six months after the giving of such notice.

[Amended by L. 1870, ch. 280: page 64, *infra*.]

Mortgagee's Lien.

§ 78. If such payment shall be made, the sale shall be of no further effect, and the mortgagee shall have a lien on the premises for the amount paid, with the interest which may thereafter accrue thereon, at the rate of seven per cent per annum, in like manner as if the same had been included in his mortgage.

Failure to Pay.

§ 79. In case the mortgagee shall fail to make such payment within the time so limited, he shall not be entitled to the benefit of section seventy-six of this act.

Mortgagee and Purchaser Defined.

§ 80. The term "mortgagee," as used in this act, shall be construed to include assignees whose assignment shall be duly recorded, and personal representatives; and the term "purchaser," shall be construed to include assignees, and real or personal representatives, as the case may be.

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Notices, how Served.

§ 81. The notice required by section seventy-seven of this act, may be given either personally or in the manner required by law, in respect to notices of non-acceptance or non-payment of notes or bills of exchange, and a notarial certificate thereof shall be presumptive evidence of the fact; such certificates may be recorded in the county in which the mortgage was recorded, in the same manner and with the same effect as is by law prescribed in respect to deeds or other evidences of title of real estate.

[Amended by L. 1870, ch. 280; page 65, *infra*.]

Notices, to Whom Directed.

§ 82. The notice required to be given under the last preceding five sections, in cases of sales by the comptroller, shall be directed only to such persons as shall within two years from the time of such sale file in the office of the comptroller, a notice stating the name of the mortgagor and mortgagee, the date of the mortgage, and the amount claimed to be due thereon, and the county, town and tract in which the mortgaged premises are situated, with the number of the lot on which said mortgage is claimed to be a lien, with the name of the person or persons claiming notice, their residence, and the post-office to which such notice shall be addressed; in case such mortgagee or other person shall omit or neglect to file such notice with the comptroller within the said two years, then said mortgagee or other person shall be barred from all claim to redemption by virtue of said mortgage, and the title of the purchaser shall become valid and effectual the same as if such mortgage had not existed.

Invalid Sales.

§ 83. Whenever the comptroller shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever invalid or ineffectual to give title to the lands sold, the lands so improperly sold shall not be

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conveyed, but the comptroller shall cancel the sale, and forthwith cause the purchase money and interest thereon to be refunded out of the state treasury to the purchaser, his representatives or assigns.

Error, how Charged.

§ 84. If the error originated with the county or town officers, the sum so paid shall be a charge against the county from which the tax was returned ; and the board of supervisors shall cause the same to be assessed, levied, collected, and paid to the treasurer of this state.

Cancelling Sale and Refunding Money.

§ 85. If the discovery that the sale was invalid shall not be made until after the conveyance shall have been executed for the lands sold, it shall be the duty of the Comptroller, on receiving evidence thereof, to cancel the sale, to refund out of the state treasury to the purchaser, his representatives or assigns, the purchase money, and interest thereon, and to recharge the county from which the tax was returned, with the amount of purchase money, and interest at the rate of seven per cent from the time of the sale, and such county shall cause the same to be levied and paid, as provided in the last preceding section.

Expenses of Sale to be Apportioned.

§ 86. The expenses attending the sales for taxes out of this act, including a due proportion of the expenses of publishing lists and notices and transmitting copies thereof, and not hereinbefore provided for, shall be a charge on the lands out of which the sales are made ; and an equal part of such expense shall be added to the taxes, interest, and other charges, on each parcel of land out of which a sale may be made.

[Amended by L. 1878, ch. 152 ; page 72, *infra*.]

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Moneys to be paid into Treasury.

§ 87. The moneys received upon every such sale for taxes and interest, and also for the expenses of sale, shall be paid into the state treasury, and the accounts of persons entitled to any portion of the moneys so received, for such expenses, shall be audited by the comptroller, and paid out of the state treasury.

Neglect of Duty.

§ 88. If any of the officers concerned in the execution of this act, shall willfully neglect or refuse to perform the duties assigned them, such officer shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine or imprisonment, or both, in the discretion of the court.

Pay of County Treasurers.

§ 89. The county treasurers of the several counties of this state, shall not, after the thirty-first day of May next, receive any moneys in payment of the taxes of eighteen hundred and fifty-two and eighteen hundred and fifty-three, but they shall forthwith transmit to the state treasurer all money received by them in payment of such taxes, and the interest thereon up to that time, and shall at the same time furnish the Comptroller with a full account of the same, exhibiting the lots, tracts, pieces, or parcels of land, particularly describing each as described in the books of his office, upon which such taxes were paid; the amount paid upon each, and the year for which such tax was paid; and if any part of such money shall have been paid on parts of lots or tracts, upon certificates made by the comptroller, the description of such part shall be the same as contained in such certificate.

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Payments, how Credited.

§ 90. The comptroller shall, upon the receipt of such account, cause all payments therein to be duly credited to the several tracts, pieces or lots of lands so paid, on the books in his office, as specified by section thirty-nine of chapter two hundred and ninety-eight, of the laws of one thousand eight hundred and fifty; and the comptroller shall, on and after the first day of June next, be invested with all the powers and duties relating to the collection of said taxes of one thousand eight hundred and fifty-two and one thousand eight hundred and fifty-three, and the sale of lands for non-payment of the same, as are conferred by this act in relation to unpaid taxes hereafter to be returned to, and admitted to the comptroller.

Exceptions.

§ 91. The provisions of this act (except sections two, three, eight, twelve, thirteen and fourteen), shall not in any manner affect or apply to the city and county of New York, the city of Albany, the city of Brooklyn, in the county of Kings, or the village of Williamsburgh, in said county of Kings; and in said sections the words "county treasurer" shall be construed to include the chamberlain of the city and county of New York.

Acts Repealed; Saving Clause.

§ 92. The act entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands in the counties where they are assessed," passed April ten, one thousand eight hundred and fifty, and the act entitled "An act in relation to the publication of notices previous to the conveyance of lands sold for taxes," passed April six, one thousand eight hundred and fifty, and all laws inconsistent with this act, are repealed: but the repeal or anything contained, (except section thirty, in relation to the cancellation of over-

Laws of 1860, Chap. 209.

charged taxes, and sections eighty-nine and ninety, in relation to the taxes of the years one thousand eight hundred and fifty-two and one thousand eight hundred and fifty-three, shall not in any manner affect any tax levied or assessed in either of the years one thousand eight hundred and forty-nine, one thousand eight hundred and fifty and one thousand eight hundred and fifty-one, nor any proceeding for the collection thereof, by sale of the land taxed or otherwise; nor the rights of any person which have accrued or may accrue by reason of any such sale or proceeding, nor the powers of county treasurers in relation to the collection of the taxes of eighteen hundred and fifty-two and eighteen hundred and fifty-three, except as provided by sections eighty-nine and ninety, of this act above mentioned; and all taxes heretofore levied or assessed, which have been or shall be hereafter rejected by the comptroller, and shall be hereafter returned to him, after having been duly relaid or reassessed, with corrected descriptions, shall, for the purpose of this act, be deemed to have been levied and assessed in, and to be the taxes of the year in which the tax was so relaid and the description perfected.

LAWS 1860, CHAP. 209.

AN ACT to amend the act entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," passed April thirteenth, eighteen hundred and fifty-five.

Section Sixty-five Amended.

SECTION 1. Section sixty-five of the act, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," passed April thirteenth, eighteen hundred and fifty-five, shall read as follows :

Laws of 1862, Chap. 285.

Conveyance, how Executed ; presumption.

Such conveyance shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, surveyor-general or treasurer, and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto. But where the person or persons claiming title under such conveyance, or the grantees or assignees of such persons, shall be in possession of the land described therein, either by himself or themselves, or his or their grantees, assignees, agents, tenants or servants, then such conveyance shall be presumptive evidence of the facts above stated, whatever may be the date of such conveyance.

LAWS 1862, CHAP. 285.

AN ACT to amend chapter four-hundred and twenty-seven of the laws of eighteen hundred and fifty-five.

Section Eighty-two Repealed.

SECTION 1. The eighty-second section of the act entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," passed April thirteenth, eighteen hundred and fifty-five, is hereby repealed.

Comptroller and Employees not to be Interested in Sales.

§ 2. It shall be unlawful for the comptroller of this state, and for any person employed in the office of such comptroller, to be interested directly or indirectly in any tax sale made by such comptroller, or in the title acquired

Laws of 1870, Chap. 280.

by such sale, or in any money paid or to be paid for the redemption of any lands sold for taxes or on the cancellation of any tax sale ; and it shall be unlawful for any person to pay to the comptroller or to any employee in his office, and for the said comptroller or any employee in his office to receive, directly or indirectly any compensation, reward or promise thereof, from any person or persons who are interested in any purchase or purchases of lands sold for taxes, for any service or services performed or to be performed in regard to such sale, redemption, cancellation or such tax title. If any person offend against any provision of this section, he shall be deemed guilty of a misdemeanor ; and the sale by the comptroller of any lands in which such person shall be interested contrary to the provision of this section, is hereby declared to be void.

LAWS 1870, CHAP. 280.

AN ACT to amend an act passed April thirteenth, eighteen hundred and fifty-five, entitled " An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Right of Mortgagee to Redeem ; Section Repealed.

SECTION 1. A mortgagee whose mortgage is duly recorded, or the assignee of any mortgage whose assignment is duly recorded, and the personal representatives of such mortgagee or assignee, who shall have filed with the comptroller, as required by law, a notice and description of his mortgage, may, at any time after the sale of all or any part of the mortgaged premises for unpaid taxes, and before the expiration of six months from the giving of the notice required by section seventy-seven of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled " An act in relation to the collection of taxes on lands of non-residents, and to provide for the

Laws of 1870, Chap. 280.

sale of such lands for unpaid taxes," may redeem the said premises so sold, or any part thereof, from the said sale. If the said sale shall have been made by the comptroller, such redemption shall be made by paying to the state treasurer, upon the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest at the rate allowed by law in the case of redemption by occupants from the date of such certificate; and, if the said sale shall have been made by a county treasurer, or other county officer, the redemption shall be made by paying to the county treasurer the amount for which said lands were sold, with interest at the same rate from the day of sale. The mortgagee or assignee of a mortgage or other person redeeming lands sold for unpaid taxes, as authorized by this section, shall have a lien on the premises so redeemed for the amount paid, with interest thereon from the time of such payment, at and after the rate of seven per centum per annum, in like manner as if the same had been included in the mortgage. Section one of chapter two hundred and eighty-five of the laws of eighteen hundred and sixty-two, entitled "An act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five," passed April seventeenth, eighteen hundred and sixty-two, is hereby repealed.

*Section Seventy-seven of Chapter 427, Laws of 1855,
Amended.*

§ 2. Section seventy-seven of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, mentioned in the first section of this act, is hereby amended by adding thereto these words: "Such notice may be given at any time after the expiration of two years from the last day of such sale."

Laws of 1873, Chap. 120.

Section Eighty-one of Same Act Amended.

§ 3. Section eighty-one of said chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five is hereby amended by adding thereto the following paragraph :

“ A copy of such notice served, together with the affidavit of some person, who shall be certified as credible by the officer before whom such affidavit shall be taken, that such notice was duly served, specifying the mode of service, shall be filed in the office of the comptroller within one month after such service.”

LAWS 1873, CHAP. 120.

AN ACT conferring certain additional powers upon the comptroller.

Comptroller May Set Aside Cancellation of Sale.

SECTION 1. The comptroller of the State of New York shall have the power to set aside any cancellation of sale made by him under the provisions of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled “ An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes ” in either of the following cases: First. Whenever such cancellation was procured by fraud or misrepresentation. Second. Whenever such cancellation was procured by the suppression of any material fact bearing upon the case. Third. Whenever the cancellation was made under a mistake of fact. But the comptroller shall in all cases specify the particular grounds upon which said cancellation is set aside.

LAWS 1878, CHAP. 152.

AN Act further to amend section two of title two of chapter thirteen of part one of the Revised Statutes, entitled "Of the assessment and collection of taxes," and to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

SECTION 1. Section two of title two of chapter thirteen of part one of the revised statutes, as amended by chapter one hundred and seventy-six of the laws of eighteen hundred and fifty-one, is hereby amended so as to read as follows :

§ 2. Lands occupied by a person other than the owner may be assessed to the occupant, as lands of non-residents, or, if the owner resides in the county in which such lands are located, to such owner.

Certain Sections of Act Amended.

§ 2. Sections nine, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-seven, thirty-three, thirty-four, thirty-seven, thirty-eight, forty-one, forty-eight and eighty-six of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, are hereby amended so as to read as follows :

Lands Imperfectly Described.

§ 9. Whenever any account of arrears of taxes on lands of non-residents shall be received by the comptroller from a county treasurer, he shall examine such account and reject all taxes entered thereon, that shall be found to be erroneous, and all taxes found thereon charged on lands erroneously or imperfectly described, and shall credit such county treasurer in a book to be kept by him for that

Laws of 1878, Chap. 152.

purpose, with the amount of all arrears of taxes which shall be admitted by him.

Rejected Taxes.

§ 16. The comptroller shall, on or before the first day of September in each year, transmit by mail or otherwise, to each county treasurer, a transcript of the taxes, of the preceding year, assessed in any town or ward in such county, which shall have been rejected by him for any cause whatever, stating therein the cause of such rejection.

Taxes on Lands Imperfectly Described.

§ 17. Whenever the comptroller, after having transmitted such annual transcript, shall discover that any taxes credited to a county in the books of his office are erroneous, or that they have been assessed on land erroneously described or so imperfectly described that they can not, in his opinion, be located with certainty, he shall cancel such taxes on the books of his office and charge them to the county in which such lands shall lie, with the interest thereon from the first day of March, in the year following that in which the taxes were laid to the first day of February next after such cancellation.

Transcript to be Delivered to Supervisors.

§ 18. The comptroller shall also transmit, by mail or otherwise, a transcript of the returns of such taxes, with the addition of such interest, to the proper county treasurer who shall deliver the same to the supervisor of the town or ward in which such taxes were assessed, by whom it shall be delivered to the board of supervisors at their next meeting. If the town or ward, in which such taxes were originally assessed shall have been divided since such assessment, the county treasurer shall deliver such transcript to the board of supervisors at their next meeting.

Description of Lands to be Made.

§ 19. Whenever the comptroller shall have rejected any tax in the first instance, or have cancelled and charged the same to a county to which it had previously been credited, the supervisor of the town or ward in which such lands are situate, shall, if in his power, add to the assessment-roll of such town or ward for the year during which such transcript shall have been forwarded by the comptroller to the county treasurer, an accurate description of such lands and the correct amount of taxes thereon, stating the tax of each year, and each kind of tax, separately, and shall furnish the comptroller with all such maps and surveys of such lands as shall have been required by him; and, if necessary, he may cause a survey and map of each lot or parcel returned for more perfect description to be made and the expense of such survey and map shall be a charge upon such land to be added to the tax thereon, and the board of supervisors shall direct the collection of such taxes and expenses so added to such assessment-roll, and they shall, for all the purpose of this act, be considered as the taxes of the year in which the description shall be perfected. If the supervisor of such town or ward shall not have fully complied with the requirements of this section, the comptroller shall not thereafter admit, but shall reject all such reassessed, cancelled or rejected taxes as may be returned to him.

If not Made, Tax to be Assessed upon Town.

§ 20. If the correct amount of such taxes and an accurate description of such lands shall not have been added, by such supervisor, to the assessment-roll of his town or ward for the year during which such transcript shall have been forwarded by the comptroller to the county treasurer, the board of supervisors shall cause such arrears of taxes and the interest thereon, to be levied on the valuations of the estates, real and personal, of the town or ward in which such taxes were originally assessed, and shall

Laws of 1878, Chap. 152.

direct the same to be collected with the other taxes of the same year.

Where Town or Ward since Divided.

§ 21. If the town or ward in which such taxes were originally assessed shall have been divided since such assessment, then such taxes and interest shall be apportioned by the board of supervisors among the towns and wards included in the limits of such original towns or wards in such equitable manner as they may deem proper.

Certificate of Taxes Due.

§ 27. The comptroller shall, from time to time, give to any person desiring to pay the taxes, interest and charges due on any tract, piece or parcel of land, a certificate of the amount of such taxes, interest and charges; and the state treasurer may receive such taxes, interest and charges and give a receipt therefor upon such certificate, which shall be countersigned by the comptroller, and entered in the books of his office.

Land, when to be Sold

§ 33. Whenever any tax charged on lands returned to the comptroller, and the interest thereon shall remain unpaid for two years from the first day of May, following the year in which the same was assessed, the comptroller shall, as soon thereafter as he shall deem it for the best interests of the state, proceed to advertise and sell such lands in the manner hereinafter provided.

List of Lands and Notices of Sale.

§ 34. He shall make out a list or statement of the lands charged with such tax and interest and so liable to be sold, and shall cause so many copies thereof to be printed as shall be sufficient to furnish each county treasurer with at least five copies, and each town and city clerk with at

Laws of 1878, Chap. 152.

least two copies, and shall transmit to each county treasurer such number of said copies as shall be equal to five copies for such county treasurer and two copies for each town and city clerk in his county. And the comptroller shall also make and cause to be printed and published in two public newspapers to be selected by him in each county, once in each week, for ten successive weeks prior to the commencement of the sale, a list or statement of all the lands in such county charged with such tax and interest. Such publication shall be in the body of each newspaper, and not in a supplement. If there shall not be two newspapers, known to the comptroller, published in any county, such list or statement shall be published as required above, in the two newspapers which the comptroller shall believe to be most generally circulated in such county. But no error in the printed description in such newspapers shall vitiate or in any manner affect the validity of such sale; and all expenses of printing such lists or statements shall be audited by the comptroller, and paid out of the treasury of this state, on receiving one copy of the newspaper containing the same, with an affidavit of the publication of such list or statement according to the provisions of this section, to be made by the printer, publisher or some other person to whom the fact of such publication shall be known.

Expenses, how Charged.

§ 37. The expenses incurred by the state in printing and transmitting any list of lands liable to be sold for taxes, and in publishing notices of sale and lists or statements of such lands, shall be charged on the lands mentioned in such lists; and an equal part of such expense shall be estimated and apportioned by the comptroller and charged on each of the several tracts or parcels of such land.

Laws of 1878, Chap. 152.

Copies in Treasurer's Office.

§ 38. Each county treasurer shall retain in his office five of the copies of the list or statement of lands to be sold, transmitted to him, and shall permit all persons at all reasonable hours to examine the same, and shall cause the remaining copies to be delivered to the town and city clerks.

General Notice.

§ 41. After transmitting such lists to the county treasurers, the comptroller shall cause to be published, once in each week, for twelve weeks successively, in two newspapers in or for each county, to be selected by him in the same manner as is provided in section thirty-four of this act for selecting newspapers to publish the lists of lands liable to be sold, a general notice, stating that a list of all the lands liable to be sold for taxes has been forwarded to each of the county treasurers and town and city clerks in this state, and that so much of said lands as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale, will, on a day to be mentioned in such notice, and the succeeding days be sold at public auction at the capitol in the city of Albany.

New Certificate of Sale.

§ 48. When the comptroller shall have cancelled any sale in the manner provided in section forty-seven of this act, he may issue a certificate of such sale to any other person who will pay the amount for such certificate which would be payable therefor by the original purchaser in case the said sale had not been cancelled, or if such certificate can not be sold, he may transfer the same to the people of the state; but in all cases where the people of the state becoming the purchasers by such transfer, the whole quantity of land liable to sale for the purchase-money mentioned in such certificate shall be covered by such purchase, the same as if no person had offered to bid therefor at the sale.

Laws of 1881, Chap. 402.

Expenses of Sale.

§ 86. The expenses attending the sales for taxes made under this act, including a due proportion of the expenses of printing and publishing lists and notices and transmitting copies thereof, not hereinbefore provided for, shall be a charge on the lands out of which the sales are made, and an equal part of such expense shall be estimated by the comptroller, and added to the taxes, interest and other charges on each parcel of land out of which a sale may be made.

LAWS 1881, CHAP. 402.

AN ACT further to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Forty-three Amended.

SECTION 1. Section forty-three of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

Comptroller may Apply for Maps; Lists to be Transmitted.

§ 43. 1. Whenever the comptroller, preparatory to a sale of lands for taxes, shall deem it necessary in order to test the correctness of the descriptions thereof, he may apply to the board of supervisors of any county for maps of any tracts of land charged with taxes, and returned from such county. And the board of supervisors to whom such application shall be made shall furnish such maps, at the expense of the county, if they can be procured, and if not, they shall then furnish such descriptions of the lands as

Laws of 1881, Chap. 402.

they can obtain, with a statement of the quantity in each subdivision, if the same be divided.

2. It shall be the duty of the treasurer of each of the counties of Cattaraugus, Chautauqua, Monroe, Oswego, Suffolk and Sullivan, and of every other county for which there may, at the time, be a special law authorizing and directing the treasurer thereof to sell "lands of non-residents" for unpaid taxes thereon, and by and under the provisions of which such taxes are not to be returned to the comptroller, and he is hereby required to transmit to the comptroller, at least one month prior to any state tax sale, a certified list and statement of all lands bid in in the name of his county at, or transferred to his county from, any tax sale, or to which his said county may have acquired tax title, the deed for which has not been recorded in the office of the clerk of his said county, which may then be liable to be sold at said sale.

3. It shall be the duty of the clerk of each of the several counties of this state, and he is hereby required to transmit to the comptroller, on the receipt of a list of the lands liable to be sold at any state tax sale, and at least one month prior to such sale, a certified list of all lands then on record in his office, or lands the deeds for which are in his office for record, then owned by his said county, and liable to be sold at such sale.

Section Forty-four Amended.

§ 2. Section forty-four of said act is hereby amended so as to read as follows:

Comptroller to Sell Lands.

§ 44. On the day mentioned in the notices, the comptroller shall commence the sale of such lands, and shall continue the same from day to day, until so much of each parcel shall be sold as will be sufficient to pay all the taxes due thereon for the years for the taxes of which said

Laws of 1881, Chap. 402.

sale shall be made, with the interest and charges thereon ; but no lot, piece or parcel of land against which the people of the state of New York then hold a bond or lien, for any part of the purchase-money thereof, or unpaid interest thereon, shall be sold at such sale.

Section 48 Amended.

§ 3. Section forty-eight of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, as amended by chapter one hundred and fifty-two of the laws of eighteen hundred and seventy-eight, is hereby amended so as to read as follows :

Canceled Certificates ; Re-sale.

§ 48. When the comptroller shall have canceled any sale in the manner provided in section forty-seven of this act, he may issue a certificate of such sale to any other person who will pay the amount for such certificate which would be payable therefor by the original purchaser, in case the said sale had not been canceled, or, if such certificate can not be sold, he shall transfer the same, if the land described thereon is in the county of Cattaraugus, Chautauqua, Monroe, Oswego, Suffolk, Sullivan or any other county for which there may, at the time, be a special law authorizing and directing the treasurer thereof to sell "lands of non-residents" for unpaid taxes thereon, and by and under the provisions of which such taxes are not to be returned to the comptroller, to said county in which said land is located ; but if it be located in any other county, he shall, in such case, transfer the same to the people of the state ; but in all cases where either a county or the people of the state became the purchaser by such transfer the whole quantity of land liable to sale for the purchase-money mentioned in such certificate shall be covered by such purchase, the same as if no person had offered to bid therefor at the sale.

Laws of 1881, Chap. 402.

Section Fifty Amended.

§ 4. Section fifty of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five is hereby amended so as to read as follows :

Redemption of Lands Sold for Taxes ; Lands not to be Despoiled.

§ 50. The owner or occupant of any land so sold for taxes, or any other person, may redeem the same, as hereinafter provided, at any time within two years after the last day of such sale, by paying to the state treasurer, on the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in the certificate of sale therefor, with interest thereon at the rate of ten per centum per annum, from the date of such certificate of sale ; but until such redemption shall be made, neither such owner nor occupant, nor any other person, shall have any right to despoil such land of its value by the destruction or removal of any building, or by the cutting, removal or destruction of timber or other valuable products growing, existing, or being thereon. The purchaser of any wild, vacant or unoccupied land at such sale, or the assigns of such purchaser, shall have no right or authority to enter upon or exercise acts of ownership over such land, until the expiration of the two years allowed for the redemption thereof from such sale ; but such purchaser, whose bid therefor shall have been fully paid, or the assignee or representative of such purchaser at such sale may, at any time within twenty-three months from the last day of said sale, serve, or cause to be served, a notice on any person despoiling said land, or any person interested in such despoliation ; which notice may be served personally or by leaving the same at the residence of such person with any member of his family of suitable age and discretion, and shall state that such land, describing it substantially as sold, was sold for taxes by the comptroller.

Laws of 1881, Chap. 402.

and that unless the said land be redeemed within one month from the date of the service of such notice, an action to recover the value of the buildings or products destroyed or removed therefrom from the date of the said sale thereof will be instituted against any or all persons concerned in such depredations. And, if such land shall not be redeemed from said sale within one month from the day of the service of such notice, then the person or persons engaged or interested in making such depredations shall be liable, if adjudged guilty by the court before which such action is held to pay to the holder of the said tax sale certificate therefor, the full value of any building so destroyed or removed therefrom, and of the timber, bark or other products so cut, destroyed or removed therefrom, from the date of the said tax sale of said land to the termination of said action.

Section Sixty-Six Amended.

§ 5. Section sixty-six of said act is hereby amended so as to read as follows :

When Comptroller to Bid in ; Certificates ; Deeds.

§ 66. 1. It shall be the duty of the comptroller, at any tax sale held by him, to bid in for the state all lands liable to sale thereat then belonging to the state or that are then mortgaged to the commissioners for loaning certain monies of the United States ; and to bid in for each of the counties of the state all other lands liable to be sold thereat then belonging to said counties, respectively, and also all lands which may have been bid in by or for said counties, respectively, at any tax sale which has not been cancelled, or from which said lands may not have been duly redeemed, and to reject any and all other bids which may be made for any or all of said lands.

2. It shall further be the duty of the comptroller, at any such sale, to bid in for each of the counties of Cattaraugus, Chautauqua, Monroe, Oswego, Suffolk and Sul-

Laws of 1881, Chap. 402.

livan, and for all other counties for which there may at the time be special laws authorizing and directing the treasurer thereof to sell "lands of non-residents" for unpaid taxes thereon and by and under the provisions of which such taxes are not to be returned to the comptroller, respectively, every lot of land in each of said counties, respectively, liable to be sold at said sale, for which no person shall offer to bid, and to bid in for the state every other lot of land liable to be sold at said sale for which no person shall so offer to bid.

3. Certificates of sale for all lands bid in by the comptroller under the provisions of subdivisions one and two of this section shall be made by the comptroller, which shall describe the lands purchased and specify the time when a deed therefor can be obtained. Such purchases shall be subject to the same right of redemption as purchases by individuals; and if the lands so sold shall not be redeemed, the comptroller's deed therefor shall have the same effect, and become absolute in the same time, and on the performance of the like conditions, as in the case of sales and conveyances to individuals.

4. The comptroller shall charge to each county, respectively, on the books of his office, the amount for which it may be liable, by reason of any and all purchases made in accordance with the preceding provisions of this section. Such amount shall become due on the last day of each tax sale, respectively, and shall be payable in the same manner as the state tax is now required by law to be paid.

5. The comptroller shall, as soon as practicable after each tax sale, transmit the certificates of sale for said lands to the treasurer of each of said counties, respectively, on receipt of which, said treasurer shall enter the same, in their proper order, in a book to be provided by him for such purpose, and shall have, unless otherwise directed by the board of supervisors of his county, full power and authority, until the expiration of two years from the last day of said sale, to sell and assign any or all of said certifi-

Laws of 1885, Chap. 448.

cates for any land not at the time owned by his county, on payment therefor, into the county treasury, of the amount for which the land described thereon was sold at said tax sale, with interest thereon from the date of such tax sale to the date of such sale and assignment by him. Any such sale and assignment shall be duly and fully entered by such county treasurer in the book aforesaid, which book shall be a part of the records of the county.

6. In case said tax sale certificate or certificates shall not have been sold or assigned by the respective county treasurers on or before the expiration of two years from the last day of said sale, each of said county treasurers shall then transmit such unsold certificate or certificates to the comptroller, who shall issue to the board of supervisors of each county, respectively, a deed or deeds for all the lands described thereon then remaining unredeemed, or the sale of which has not been cancelled. The title thus acquired by the boards of supervisors shall be held by them in trust for their respective counties, and may be disposed of by them at such times and on such terms as shall be determined on by a majority of such board at any regular or special meeting thereof.

Inconsistent Acts Repealed.

§ 6. All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

LAWS 1885, CHAPTER 448.

AN ACT to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Sixty-five of Act Amended.

SECTION 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and

Laws of 1885, Chap. 448.

fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as read as follows :

Comptroller to Execute Conveyance : Evidence.

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action

Laws of 1885, Chap. 453.

brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

Act Applicable Only to Certain Counties.

§ 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

[This section amended by L. 1891, ch. 217, and L. 1893, ch. 398: pages 86 and 88, *infra*.]

LAWS 1885, CHAP. 453.

AN ACT further to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Four of Act Amended.

SECTION 1. Section four of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

Laws of 1885, Chap. 453.

*Return of Unpaid Taxes on Non-resident Lands ;
Evidence.*

§ 4. Whenever any county treasurer shall receive from a collector an account of unpaid taxes assessed on lands of non-residents, such county treasurer shall compare the same with the original assessment-roll to which the collector's warrant is attached, which rolls the collectors are required in all cases to return and deposit with their respective county treasurers ; and if he finds it to be a true transcript thereof he shall add to it a certificate showing that he has examined and compared the account with said roll and found the same to be correct ; and after crediting the collector with the amount, shall, before the first day of April next ensuing, transmit the account and collector's affidavit to the comptroller, with a certificate that he has compared the account with the entries of the same taxes in the original assessment-roll to which the collector's warrant is attached, and has found the same to be a true transcript of such roll. The comptroller may, before admitting any taxes thereon, return such accounts to the respective county treasurers for correction or completion, which must be returned to him within one month thereafter, or as the comptroller may otherwise direct, and such account, when accepted by the comptroller, shall be deemed conclusive evidence of the regularity and validity of all taxes thereon which may be admitted by him and of all prior proceedings in assessing the lands and levying and collecting such taxes, except in cases when it shall be satisfactorily proven to the comptroller that any such tax was duly paid in the county, or was levied on an assessment of land by a town or ward having no legal right to assess the same, or arose from a double assessment, the taxes levied on one of which were duly paid.

Section Twenty-two Amended.

§ 2. Section twenty-two of said chapter is hereby amended so as to read as follows :

Cancellation of Tax ; Relevy ; Evidence.

§ 22. Whenever it shall be made to appear to the comptroller that any tax returned as unpaid was, previously to such return, paid to the collector or county treasurer, the comptroller shall cancel such tax on the books of his office ; and if the same shall also have been paid into the state treasury, he shall cause it to be repaid out of the treasury to the person by whom such payment shall have been made. Whenever any unpaid tax, levied upon an assessment of land by a town or ward having a legal right to assess the same, which may have been returned to and admitted by the comptroller, shall be ascertained, either before or after sale therefor, to be illegal or void by reason of any irregularity or defect in, or omission of, statutory requirements for creating or collecting such tax, the comptroller is hereby empowered and directed, whenever deemed practicable by him, to relevy the correct amount of such tax and add thereto the five per cent allowed by law to be added by the collector, which aggregate amount of tax and charge, with interest thereon at ten per cent per annum from the first day of August following the admission of such illegal or void tax, shall thereupon be due and payable, and shall be subject to existing provisions of law governing the collection of and sale for unpaid taxes by the comptroller ; but no tax arising from a double assessment, the taxes levied on one of which shall be satisfactorily proven to the comptroller to have been duly paid, shall be subject to such relevy. Such relevy of any invalid or defective tax shall be conclusive evidence of its regularity and legality, and any such tax, so relevied, shall be treated and subject to payment as though such sale had not been made, and, if allowed to remain unpaid, the land shall be sold therefor.

Section Seventy-four Amended.

§ 3. Section seventy-four of said chapter is hereby amended so as to read as follows :

Redemption after Sale.

§ 74. The occupant of any such lot, or any other person, may, at any time before the service of said notice by the purchaser, or the the* person claiming under him, redeem any lands so occupied, by filing in the office of the comptroller satisfactory evidence of the occupancy required and by paying to him the consideration money for which the lands to be redeemed were sold, and thirty-seven and a half per cent thereon, together with the sum paid for a deed, if any, and such amounts as may have been paid to the state for subsequent taxes thereon, or for redemptions from subsequent tax sales thereof, and, in addition thereto, providing such lot has been legally exempt from taxation for one or more years subsequent to the sale in question, of a sum that would represent the gross amount of taxes and interest that would have been due thereon, providing it had been taxed, during each of the years it may have been so exempt, on its assessed valuation, and at the rate per cent of taxation thereon for the year when last returned to the comptroller's office.

Additional Section.

§ 4. Said chapter is hereby amended by the addition thereto of the following section :

After Advertisement, Lands to be Deemed in Possession of State.

§ 93. From and after the advertisement, once a week for three successive weeks, of a list of wild, vacant or forest lands, to which the state holds title from a tax sale or otherwise, in one or more newspapers to be selected by the comptroller, published in the county in which such lands may be located, all of such wild, vacant or forest lands shall be deemed, and are hereby declared to be, in the actual possession of the comptroller of this state; and such possession shall be deemed to continue until

* So in the original.

Laws of 1890, Chap. 556.

he has been dispossessed by the judgment of competent tribunal.

Act not Applicable to Certain Counties.

§ 5. The provisions of this act shall not apply to the counties of Cattaraugus and Chautauqua.

LAWS 1890, CHAP. 556.

AN ACT further to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Seventy-four of Act Amended.

SECTION 1. Section seventy-four of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," as amended by chapter four hundred and fifty-three of the laws of eighteen hundred and eighty-five, is hereby further amended so as to read as follows :

Redemption of Lands by Occupant.

§ 74. The occupant of any such lot, or any other person may at any time before the service of said notice by the purchaser or the person claiming under him, and within three years from the expiration of the two years allowed by law for the redemption thereof, redeem any lands so occupied, by filing in the office of the comptroller satisfactory evidence of the occupancy required, and by paying to him the consideration money for which the lands to be redeemed were sold, and thirty-seven and one-half per centum thereon together with the sum paid for a deed, if any, and such amount as may have been paid

Laws of 1890, Chap. 556.

to the state for subsequent taxes thereon, or for redemption from subsequent tax sales thereof, and, in addition thereto, providing such lot has been legally exempt from taxation for one or more years subsequent to the sale in question, of a sum that would represent the gross amount of taxes and interest that would have been due thereon, providing it had been taxed during each of the years it may have been exempt, on its assessed valuation, and at the rate per cent of taxation thereon for the year when last returned to the comptroller's office. In all cases of tax sales heretofore made by the comptroller, where the land sold was in the actual occupancy of any person at the expiration of the two years allowed for the redemption thereof, and the purchaser or the person claiming under him shall have failed to serve notice of such sale on the occupant or occupants thereof and to file evidence of such service in the comptroller's office, as provided by section sixty-eight of this act, and the occupant or any other person shall fail to file in the comptroller's office within one year after this act shall take effect, a written notice of such occupancy together with an application for the redemption of such lands, and to furnish the comptroller with satisfactory evidence of the occupancy required and make such redemption within two years after this act shall take effect, then, and in all such cases, the said tax sale of such land, and the conveyance thereof by the comptroller, shall become absolute, and the occupant and occupants and all other persons interested in the said lands shall be forever barred from all right and title thereto.

Inconsistent Acts Repealed.

§ 2. All acts and parts of acts inconsistent with this act are hereby repealed.

LAWS 1891, CHAP. 217.

AN ACT to amend chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes.'"

Act Amended.

SECTION 1. Section two of chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes,'" is hereby amended so as to read as follows :

Application of Act.

§ 2. The provisions of this act are hereby made applicable to all the counties in this state, except the counties of Cattaraugus and Chautauqua, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken or application duly made within six months thereafter, for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder. All applications heretofore or hereafter made to the comptroller for the cancellation of any tax sale by any person interested in the event thereof, shall be heard and determined by him, and his determination shall be subject to review by certiorari, or otherwise. The provisions of this act shall also be applicable to all conveyances made by county treasurers or county judges and to all outstanding certificates from county treasurer's sales.

Laws of 1892, Chap. 463.

Proceedings Barred.

§ 2. Nothing herein contained shall be construed to permit a proceeding to be begun or application to be made which is already barred by the provisions of the act hereby amended.

LAWS 1892, CHAP. 463.

AN ACT in relation to the redemption of lands sold at tax sales prior to the year eighteen hundred and ninety.

Time Extended for Action on Application for Redemption.

SECTION 1. In all cases in which a written notice of occupancy, together with an application for the redemption from any tax sale made prior to the year eighteen hundred and ninety, of any lands sold thereat for taxes, was filed in the comptroller's office on or before June seventh, eighteen hundred and ninety-one, in pursuance of the provisions of chapter five hundred and fifty-six of the laws of eighteen hundred and ninety, and proof tending to show the actual occupancy of such lands, as provided by said act, has been filed or may be filed in said office on or before June seventh, eighteen hundred and ninety-two, affidavits and proof in opposition to such application may be presented to the comptroller at any time prior to September first, eighteen hundred and eighty-two, and the time within which the comptroller can take action on and allow or reject such applications for redemption, and the time within which such redemptions as are allowed by the comptroller can be made, is hereby extended to December first, eighteen hundred and ninety-two.

Inconsistent Acts Repealed.

§ 2. All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

Laws of 1892, Chap. 624.

LAWS 1892, CHAP. 624.

AN ACT to confirm tax proceedings under chapter two hundred and ninety-eight of the laws of eighteen hundred and fifty.

Tax Sales in Certain Counties Confirmed.

SECTION 1. All tax sales made by the county treasurers of Lewis, Hamilton, Franklin and Herkimer counties, under and in pursuance of chapter two hundred and ninety-eight of the laws of eighteen hundred and fifty, passed April tenth (for the sale of lands in the counties where they were assessed), and all certificates of sale made and delivered by him to any purchaser of any lands at any such sale, and all deeds, executed by such treasurer and the county judge of such county, of any real estate so sold to the purchaser, his heirs or assigns, under and in pursuance of said act, are hereby legalized, confirmed and made valid. Said certificates and deeds respectively shall be received and held in all proceedings as conclusive evidence of a complete title; except that the owner of any real estate so sold, may show that said tax was imposed, and the proceedings to enforce it, were without jurisdiction.

LAWS 1893, CHAP. 398.

AN ACT to further amend chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes.'"

Act Amended.

SECTION 1. Section two of chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An act to amend chapter four hundred and

Laws of 1883, Chap. 13.

twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes,' as amended by chapter two hundred and seventeen of the laws of eighteen hundred and ninety-one, is hereby further amended so as to read as follows :

Application of Act.

§ 2. The provisions of this act are hereby made applicable to all the counties in this state, except the counties of Cattaraugus and Chautauqua but shall not effect any action, proceeding or application pending at the time of the passage of the act hereby amended, nor any action begun, proceedings taken, or application duly made within six months thereafter, for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

Saving Clause.

§ 2. Nothing contained in this act shall be construed to affect any action or proceeding now pending in any court of record, for the purpose of reviewing any determination of the comptroller of the state of New York.

LAWS 1883, CHAP. 13.

AN ACT to prohibit sales of lands belonging to the state in the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence and Warren.

SECTION 1. Hereafter and from the passage of this act no sales shall be made of lands belonging to the state situated in the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence and Warren.

§ 2. Nothing in this act shall be construed as prohibiting the commissioners of the land office from conveying

Forest Commission Act of 1885.

lands heretofore contracted to be sold, and not yet conveyed, to the purchasers thereof.

LAWS 1885, CHAP. 283.

AN ACT to establish a forest commission, and to define its powers and duties and for the preservation of forests.

SECTION 1. There shall be a forest commission which shall consist of three persons who shall be styled forest commissioners, and who may be removed by the governor for cause. The forest commissioners shall be appointed by the governor by and with the advice and consent of the senate.

* * * * *

§ 5. The forest commission shall have power to employ a forest warden, forest inspectors, a clerk and all such agents, as they may deem necessary, and to fix their compensations, but the expenses and salaries of such warden, agents, clerk, inspectors and assistants shall not exceed in the aggregate with the other expenses of the commission the sum therefor appropriated by the legislature.

* * * * *

§ 7. All the lands now owned or which may hereafter be acquired by the state of New York, within the counties of Clinton, excepting the towns of Altona and Danemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve.

§ 8. The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.

§ 9. The forest commission shall have the care, custody, control and superintendence of the forest preserve. It

Forest Commission Act of 1885.

shall be the duty of the commission to maintain and protect the forests now on the forest preserve, and to promote as far as practicable the further growth of forests thereon. It shall also have charge of the public interests of the state, with regard to forests and tree planting, and especially with reference to forest fires in every part of the state. It shall have as to all lands now or hereafter included in the forest preserve, but subject to the provisions of this act, all the powers now vested in the commissioners of the land office and in the comptroller as to such of the said lands as are now owned by the state. The forest commission may, from time to time, prescribe rules or regulations and may, from time to time, alter or amend the same, affecting the whole or any part of the forest preserve, and for its use, care and administration ; but neither such rules or regulations, nor anything herein contained shall prevent or operate to prevent the free use of any road, stream of water as the same may have been heretofore used or as may be reasonably required in the prosecution of any lawful business.

§ 10. The forest warden, forest inspectors, foresters and other persons acting upon the forest preserve under the written employment of the forest warden or of the forest commission may, without warrant, arrest any person found upon the forest preserve violating any of the provisions of this act ; but in case of such arrest, the person making the arrest shall forthwith take the person arrested before the nearest magistrate having jurisdiction to issue warrants in such case, and there make, or procure to be made, a complaint in writing, upon which complaint the magistrate shall act as the case may require.

§ 11. The forest commission may bring in the name, or on behalf of the people of the state of New York, any action to prevent injury to the forest preserve or trespass thereon, to recover damages for such injury or trespass, to recover lands properly forming part of the forest preserve, but occupied or held by persons not entitled thereto, and

Forest Commission Act of 1885.

in all other respects for the protection and maintenance of the forest preserve, which any owner of lands would be entitled to bring. The forest commission may also maintain, in the name or on behalf of the people of the state, an action for the trespass specified in section seventy-four, article fifth, title five, chapter nine, part one of the Revised Statutes, when such trespass is committed upon any lands within the forest preserve. In such action there shall be recoverable the same penalty, and a like execution shall issue, and the defendant be imprisoned thereunder without being entitled to the liberties of the jail, all as provided in sections seventy-four and seventy-six of the said article; and in such action the plaintiff shall be entitled to an order of arrest before judgment as in the cases mentioned in section five hundred and forty-nine of the Code of Civil Procedure. The trespass herein mentioned shall be deemed to include, in addition to the acts specified in the said section seventy-four, any act of cutting or causing to be cut, or assisting to cut, any tree or timber standing within the forest preserve, or any bark thereon, with intent to remove such tree or timber, or any portion thereof, or bark therefrom, from the said forest preserve. With the consent of the attorney-general and the comptroller, the forest commission may employ attorneys and counsel to prosecute any such action, or to defend any action brought against the commission or any of its members or subordinates arising out of their or his official conduct with relation to the forest preserve. Any attorney or counsel so employed shall act under the direction of and in the name of the attorney-general. Where such attorney or counsel is not so employed, the attorney-general shall prosecute and defend such actions.

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§ 14. All income that may hereafter be derived from state forest lands shall be paid over by the forest commission to the treasury of the state.

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Forest Commission Act of 1885.

§ 16. The forest commission shall, in January of every year, make a written report to the legislature of their proceedings, together with such recommendations of further legislative or official action as they may deem proper.

* * * * *

§ 19. The forest commission shall, as soon as practicable, prepare tracts or circulars of information giving plain and concise advice for the care of woodlands upon private lands, and for the starting of new plantations upon lands that have been denuded, exhausted by cultivation, eroded by torrents, or injured by fire, or that are sandy, marshy, broken, sterile or waste, and unfit for other use. These publications shall be furnished without cost to any citizen of the state, upon application, and proper measures may be taken for bringing them to the notice of persons who would be benefited by this advice.

* * * * *

§ 30. The forest commission shall, with as little delay as practicable, cause rules for the prevention and suppression of forest fires to be printed for posting in school-houses, inns, saw-mills and other wood-working establishments, lumber camps and other places, in such portions of the state as they may deem necessary. Any person maliciously or wantonly defacing or destroying such notices shall be liable to a fine of five dollars. It shall be the duty of forest agents, supervisors and school trustees to cause these rules, when received by them, to be properly posted, and replaced when lost or destroyed.

§ 31. Any person who shall willfully or negligently set fire to, or assist another to set fire to, any waste or forest lands belonging to the state or to another person, whereby the said forests are injured or endangered, or who suffers any fire upon his own land to escape or extend beyond the limits thereof, to the injury of the woodlands of another or of the state, shall be liable to a fine of not less than fifty dollars nor more than five hundred dollars, or to imprisonment of not less than thirty days nor more than six

Tax Law of 1896.

months. He shall also be liable in an action for all damages that may be caused by such fires; such action to be brought in any court of this state having jurisdiction thereof.

TAX LAW OF 1896.

Cancellation of Sales.

§ 140. The comptroller shall not convey any lands sold for taxes if he shall discover before the conveyance, that the sale was for any cause invalid or ineffectual to give title to the lands sold; but he shall cancel the sale and forthwith cause the purchase money and interest thereon to be refunded out of the state treasury to the purchaser, his representatives or assigns. If the error originated with the county or town officers the sum paid shall be a charge against the county from which the tax was returned, and the board of supervisors thereof shall cause the same to be assessed, levied and collected and paid into the state treasury. If he shall not discover that the sale was invalid until after a conveyance of the lands sold shall have been executed he shall, on application of any person having any interest therein at the time of the sale, on receiving proof thereof, cancel the sale, refund out of the state treasury to the purchaser, his representatives or assigns, the purchase-money and interest thereon, and recharge the county from which the tax was returned, with the amount of purchase money and interest from the time of sale, which the county shall cause to be levied and paid into the state treasury. On any such application the comptroller may appoint a commissioner with like powers and duties as in case of an application for redemption; provided, however, that in any county which does not include a portion of the forest preserve, such application for cancellation may also be made by the owner of the lands at the time of the tax sale.

Canal Appraisers' Act of 1870.

LAWS 1896, CHAP. 218.

AN ACT to authorize the state comptroller to hear and determine the application of Emma Zalia for cancellation of the sale of eighteen hundred and ninety of lot one hundred and eighty-nine, Paradox tract, Essex county, for unpaid taxes.

SECTION 1. Jurisdiction is hereby conferred upon the comptroller of this state to hear and determine the application of Emma Zalia for the cancellation of the eighteen hundred and ninety tax sale of lot one hundred and eighty-nine, Paradox tract, Essex county, for unpaid taxes, and conveyed therefrom to the people of the state of New York; said Zalia claiming to be the owner thereof, and the said comptroller is hereby authorized to act upon said application in the same manner and with the same effect as if the application were made by the purchaser at the said tax sale.

LAWS 1870, CHAP. 321.

AN ACT to provide for the appraisal of canal claims against the State.

SECTION 1. Jurisdiction is hereby granted to and conferred upon the Canal Appraisers to hear and determine all claims against the State of any and all persons and corporations for damages alleged to have been sustained by them from the canals of the State, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals; but no award shall be made unless the facts proved shall make out a case which would create a legal liability against the State were the same established in evidence in a court of justice against an individual or corporation; and in case such legal liability shall be satisfactorily established, then the Appraisers shall award to the claimants such sum as

Board of Audit Act of 1876.

shall be just and equitable, subject, however, to the right of appeal to the Canal Board in all cases, in the manner now provided by law ; provided that the provisions of this act shall not extend to claims arising from damages resulting from the navigation of the canals.

§ 2. The claimants shall file their claims in the office of the Canal Appraisers within two years from the time said damages shall have accrued, but claims for damages which shall have accrued more than one year prior to the passage of this act shall be filed within one year from the date hereof. The Canal Appraisers are hereby authorized and required to employ counsel on behalf of the State, on the hearing of such claims, as may be necessary to protect the interests of the State. All acts or parts of acts inconsistent with this act are hereby repealed.

§ 3. The said board of Canal Appraisers shall prescribe rules as to the form and manner in which claimants shall make out and verify their statement of claims; and they shall provide a general rule for the taking of evidence when the witness shall not be examined orally before said board, and for reducing to writing and preserving said evidence when taken. The said board is hereby authorized to issue subpoenas for the attendance of witnesses, and shall have power to compel their attendance by attachment, and to punish them for contempt, in the same manner as is now provided by law in relation to courts of record; and the said board shall also have power to administer oaths to witnesses and to issue commissions for the examination of witnesses residing out of the State.

LAWS 1876, CHAP. 444.

An Act to establish a state Board of Audit, and to define its powers and duties.

SECTION 1. A state board of audit is hereby constituted and established which shall be composed of the comptroller, the secretary of state, and the state treasurer.

Board of Claims Act.

§ 2. It shall be the duty of said board of audit, and it shall have power to hear all private claims and accounts against the State (except such as are now heard by the canal appraisers according to law), to administer oaths and take testimony in relation thereto, to determine on the justice and amount thereof, and to allow such sums as it shall consider should equitably be paid by the State to the claimants. Its decision shall be filed in the office of the Secretary of State. It shall be the duty of the Attorney General to attend every hearing before said Board of Audit, for the purpose of protecting the interests of the State, and he shall have authority to subpoena and examine witnesses on behalf of the State in reference to such claims or accounts.

§ 3. Said Board shall establish rules as the times of its sessions, which shall be at least as often as once in each month, and as to the forms and methods of procedure before it. Two members of said Board shall constitute a quorum. The concurrent vote of two of its members shall be necessary to, and shall constitute a decision.

§ 4. The Secretary of State at the opening of each session of the Legislature, and at other times when so requested by the Legislature, shall send a report thereto, containing a full list of all claims and accounts acted upon by said board, with the evidence taken and their action on each thereof, since the last preceding report.

LAWS 1883, CHAPTER 205, AS AMENDED BY CHAPTER 60 OF LAWS OF 1884.

AN ACT to abolish the office of canal appraiser and the state board of audit, and to establish a board of claims and define its powers and duties.

SECTION 1. The governor, by and with the advice and consent of the senate, shall appoint three persons commissioners of claims who shall be citizens of this state, and of whom two, but not more, shall be practicing attorneys and coun-

Board of Claims Act.

selors of the supreme court ; they shall constitute a board of claims. Said commissioners to be first appointed shall be appointed for the term of two, four and six years, respectively, from the first day of January next ensuing their appointment, and until their successors shall be appointed and have qualified, and shall enter upon the duties of their office on the first day of June, eighteen hundred and eighty-three. Two of said commissioners shall constitute a quorum for the transaction of business ; the commissioner having the shortest time to serve and who is a counselor of the supreme court shall act as presiding officer of the board. Whenever the term of office of any commissioner of claims shall expire, the governor in like manner shall appoint a successor for the full term of six years. When a vacancy in the office shall occur before the expiration of its term, the same shall be filled for the unexpired term by appointment by the governor, by and with the advice and consent of the senate, if the senate shall be in session, or if not in session, the governor may appoint some suitable person to fill such vacancy until the first day of January next succeeding such appointment, and the remainder of the unexpired term shall be filled in like manner as if such vacancy had occurred during the session of the senate. The governor may remove any commissioner of claims within the term for which he shall have been appointed, but before removing him he shall give to such officer a copy of the charges against him and an opportunity of being heard in his defense. Each of said commissioners shall take and subscribe the oath of office required by the constitution and file the same in the office of the secretary of state, and shall receive a compensation of five thousand dollars per annum, payable quarterly, and his necessary expenses, not exceeding five hundred dollars per annum for each commissioner. The persons appointed under this act to fill vacancies shall possess the same qualifications as the commissioner whose place such person is appointed to fill.

Board of Claims Act.

§ 2. The board of commissioners shall appoint, and at pleasure may remove, a clerk, a stenographer, who shall act as deputy clerk, and a messenger, each of whom, before entering upon the duties of his office, shall take the oath of office required by the constitution, and file the same in the office of the secretary of state; they shall perform their duties under the direction of the board. The clerk, under the direction of the board, shall disburse the fund which from time to time may be appropriated for the use of said board, and before entering upon the duties of his office, he shall make and file in the office of the comptroller a bond, for the faithful performance of his duties, in an amount and with sufficient sureties to be approved by the board, which approval shall be endorsed on said bond. The clerk shall receive an annual salary of three thousand dollars, in lieu of all fees, except for copies of papers. The stenographer shall receive an annual salary of fifteen hundred dollars, and five cents a folio for copies of minutes and testimony furnished at the request of the claimant; but no charge shall be made against the state by the clerk or stenographer for copies of minutes, testimony or papers furnished the attorney-general or the board of commissioners, or filed in the office of the clerk. The stenographer shall file with the clerk a copy of the minutes and testimony taken in each claim heard by the board. The messenger shall receive an annual salary of eight hundred dollars, and the clerk, stenographer and messenger shall each receive actual expenses while in the discharge of their respective duties at other places than the city of Albany. Said salaries shall be payable monthly. The commissioners shall meet on the first Monday in June, eighteen hundred and eighty-three, at the city of Albany, for the purpose of organization and appointment of said clerk, stenographer and messenger, and for the adoption of rules of procedure.

[As amended by chap. 60 of 1884.]

§ 3. Each of said commissioners and the clerk of said board shall have the power to administer oaths, and

Board of Claims Act.

said board shall have authority to establish rules for its government, and the forms and methods of procedure before it; to issue subpoenas to witnesses to appear and testify, and for the production of books and papers; to compel obedience to such subpoenas by attachment; to punish for contempt in like cases and in like manner as the supreme court; to issue commissions to take testimony, either within or without this state, to be used before it in like cases and in like manner as the supreme court issues such commissions. When testimony is taken on commission, at the instance of the claimant, the fees of the commissioner before whom it is taken and the expense of the commission shall be paid by the claimant, and when taken at the instance of the state, such commissioner's fees, together with all expense incurred by the attorney-general in his official capacity, shall be paid out of the contingent fund to be provided for said board. On the first day of January, in each year, the clerk shall report, under oath, to the comptroller a detailed statement of his receipts and disbursements for the preceding year.

§ 4. The said board shall hold at least four sessions in each year in the city of Albany, commencing, respectively, on the second Tuesday of January, April, September and November, and shall continue each session so long as may be necessary for the disposition of business, and it may hold adjourned sessions at such other times and places in the state as the board may determine necessary and proper. The sheriff of any county other than the county of Albany, on notice from said board, shall furnish suitable rooms in the court house of his county for any session or adjourned session of said board, and shall in person or by deputy if required by said board, attend said session or adjourned session, and his fees for attendance shall be paid out of the contingent fund of said board, at the same rate as for attending a term of the supreme court in said county.

[As amended by chap. 60 of 1884.]

Board of Claims Act.

§ 5. The attorney-general in person or by deputy shall attend each session of said board on behalf of the state; shall prepare all cases on the part of the state for hearing, and argue the same when prepared; shall cause testimony to be taken when necessary to secure the interest of the state; shall prepare forms, file interrogatories and superintend the taking of testimony in the manner prescribed by said board; and generally shall render such service as may be necessary to further the interests of the state in all cases before said board and in the court of appeals on appeal from the awards of said board; in all cases of claims before said board of which the canal appraisers have heretofore had jurisdiction, the superintendent of public works, on request from the attorney-general, shall furnish him such assistance as he may require to subpoena witnesses and prepare the cases for trial on the part of the state.

§ 6. Said board shall keep a record of its proceedings, and at the commencement of each session of the legislature, and at such other times during each session of the legislature as it may deem proper, or as the senate or assembly may request, report to the legislature the claims upon which it has finally acted, with the statement of the award made in each case. Said board shall have and use a seal, which shall conform as to the device thereon, and the size thereof, to the requirements contained in the provisions of chapter one hundred and ninety of the laws of eighteen hundred and eighty-two. The copy of any record, order, award or other paper certified by the clerk of said board, under the seal of said board, shall be entitled to be read in evidence, in any and all courts, and before any and all officers, with the same force and effect as papers certified under the seal of the supreme court, by a clerk thereof. Said seal shall be procured for said board by its clerk, and kept in the office of said clerk.

[As amended by chap. 60 of 1884.]

Board of Claims Act.

§ 7. Said board shall have jurisdiction to hear, audit and determine all private claims against the state which shall have accrued within two years prior to the time when such claim is filed, except claims barred by any existing statute, and to allow thereon such sums as should be paid by the state. Such board, however, shall have jurisdiction of such claims as were formerly cognizable by the state board of audit, provided they shall be filed on or before July first, eighteen hundred and eighty-four, and shall not have accrued more than six years prior to such filing. It shall also have jurisdiction of all claims, on the part of the state, against any person making a claim against the state before said board, and shall determine such claim or demand, both on the part of the state and the claimant; and if it finds that the demand of the state exceeds the demand of the claimant, it shall award such excess in favor of the state against the claimant.

[As amended by chap. 60 of 1884.]

§ 8. On the termination of a hearing before the board of claims, the commissioners, or any two of them, shall make and assign* the award of the board, which shall contain the names of the persons interested, the names of the attorneys, if any, who appeared for the claimant, or by whom the claim was made, the amount allowed the claimant, if any, and if it be a case where the state seeks to appropriate or has appropriated lands for public use, a description by metes and bounds of the land appropriated and for which the award is made, and what amount, if any, the board has deducted from the claim for claims of the state against the claimant, or payments, an entry of which shall be made in detail by the clerk of said board in the book kept by him for that purpose, which entry shall signed by the commissioners making such award.

§ 9. Books shall be kept in the office of the clerk of said board in which the orders and awards of said board shall be entered by the clerk of said board, and each of said

* So in original.

Board of Claims Act.

awards shall be entered by him in detail ; and he shall attach all the papers in any one claim, with a copy of the testimony and certified copies of all orders therein, to a certified copy of the final order or award, and file the same in his office. Any such final order or award in favor of the state shall be final and conclusive as between the state and the claimant, and the state may sue for and enforce collection of the same in any court having jurisdiction. The attorney-general shall take such proceedings as may be necessary to enforce any such order or award in favor of the state.

[As amended by chap. 60 of 1894.]

§ 10. When the amount in controversy exceeds five hundred dollars, either party feeling aggrieved by the final award or final order of the board may appeal to the court of appeals, upon questions of law only, arising upon the hearing of the claim or upon the excess or insufficiency of such award or order. The court of appeals shall hear such appeal, and affirm, reverse or modify such award or order, or dismiss such appeal, or award a new hearing before the board of claims, as justice may require. Every appeal shall be in writing, stating briefly the grounds upon which it is taken, and subscribed by the party or his attorney. A copy of such notice of appeal shall be served upon the clerk of the board and upon the attorney-general. When the appeal is taken by the state, copies of such notice of appeal shall be served upon the clerk of the board and the claimant, or the attorney appearing for him. Service of notice of appeal shall be made in like manner as in the supreme court. The appeal must be taken within thirty days after service of notice of the final award or order of the board. The party taking an appeal shall, at or before the time of serving the notice thereof, unless said board, or a commissioner thereof, shall extend the time, make and serve upon the attorney-general, or, if the appeal is taken by the state, upon the claimant or the attorney appearing for him on the hearing before the board, a case

Board of Claims Act.

containing so much of the evidence given before the board as may be necessary to present the questions raised by the notice of appeal; the respondent may propose amendments, and one of the commissioners before whom the claim was heard shall settle the same and sign the case so settled. And in case no appeal is taken from the decision of said board, as provided by this act, the decision of the board shall be final.

[As amended by chap. 60 of 1884.]

§ 11. On the hearing before the court of appeals, only such questions shall be considered by the court as are raised by the notice of appeal. And on all questions not raised by the notice of appeal it shall be presumed that sufficient evidence was given on the hearing to sustain the order or award. The practice upon the hearing of appeals in the court of appeals, from the final order or award of the board, shall conform, as near as may be, to the practice prevailing upon appeals from the courts of record of this state. Upon the hearing of all claims before the board, the rules of evidence now prevailing in the courts of record of this state shall be observed, and the practice upon such hearings of claims and taking appeals from the final order of award made therein shall conform, as near as may be, to the practice now prevailing in the supreme court of this state upon the trial of actions, and upon appeals; but in no such appeal shall the appellant be required to give a bond or undertaking.

[As amended by chap. 60 of 1884.]

§ 12. On and after the thirty-first day of May, eighteen hundred and eighty-three, the office of canal appraiser and the state board of audit are abolished. All claims against the state then pending before the canal appraisers or before the state board of audit shall be and hereby are transferred to the board of claims. Said canal appraisers and said state board of audit are hereby directed to transmit to the clerk of the board of claims all papers, documents and evidence, in cases before either of said

Board of Claims Act.

bodies pending and undetermined on the thirty-first day of May, eighteen hundred and eighty-three.

§ 13. All the jurisdiction and power to hear and determine claims against the state, formerly possessed by the canal appraisers and the state board of audit, is hereby vested in the board of claims. Whenever a claim against the state is pending before said board of claims, which the canal appraisers have heretofore had jurisdiction to hear and determine, the board shall take testimony in the vicinity where the damages are alleged to have occurred, and the premises alleged to have been damaged shall be personally viewed by said board, and said board shall hold an adjourned session in said vicinity for the purpose of hearing said claim.

[As amended by chap. 60 of 1884.]

§ 14. Suitable rooms shall be assigned in the new capitol for the sessions of the board of claims, and for the office of the clerk. Said commissioners and clerk shall have the use of the books in the state library in the course of their official duties. The legislature shall annually appropriate such sum as shall be necessary, not exceeding five thousand dollars, as a contingent fund for the use of said board.

§ 15. Costs, witness fees and disbursements shall not be taxed, nor shall counsel or attorney fees be allowed by said board to any party.

**Record in The People ex rel. The Equitable
Life Assurance Society vs. Chapin as
Comptroller (105 N. Y., 629).**

COURT OF APPEALS, }
State of New York, } ss. :

Pleas in the Court of Appeals held at the
Capitol, in the City of Albany, on the
25th day of March, in the year of our
Lord one thousand eight hundred and
eighty-seven, before the Judges of said
Court.

Witness—

The Hon. WILLIAM C. RUGER, *Chief Judge*, pre-
siding.

E. O. PERRIN, Clerk.

Remittitur, March 26, 1887.

The PEOPLE *ex rel.* The EQUITABLE
LIFE ASSURANCE SOCIETY OF THE
UNITED STATES,

Appellant,

against

ALFRED C. CHAPIN, as Comptroller
of the State of New York,
Respondent,

Be it remembered that on the third day of December,
in the year of our Lord one thousand eight hundred and
eighty-six, The Equitable Life Assurance Society, &c., the
appellant in this action, came here into the Court of Ap-
peals by Charles H. Moore, its attorney, and filed in the
said Court a Notice of Appeal and return thereto from an

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order of the General Term of the Supreme Court of the State of New York. And

Alfred C. Chapin as Comptroller, &c. the respondent in said action, afterward appeared in said Court of Appeals by D. O'Brien, Attorney General, which said Notice of Appeal and the return thereto filed as aforesaid, are herewith annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Frank E. Smith, of counsel for the appellant, and by Mr. D. O'Brien, Attorney General, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the General Term of the Supreme Court appealed from in this action be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court then to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And Hereupon as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals remitted unto the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

E. O. PERRIN,

Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, }
Albany, March 26, 1887. }

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the

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Court of Appeals, with the papers originally filed therein,
attached thereto.

[L. s.]

E. O. PERRIN,
Clerk.

At a Special Term of the Supreme Court held
in and for the County of Albany, at the
Court-house therein, on the 18th day of
March, 1886.

Present—HON. A. B. PARKER, *Justice*.

THE PEOPLE *ex rel.* THE EQUITABLE
LIFE ASSURANCE SOCIETY OF THE
UNITED STATES,

vs.

ALFRED C. CHAPIN, as Comptrol-
ler of the State of New York.

On reading and filing the petition of the Equitable Life Assurance Society of the United States, and the affidavit of Frank E. Smith, both verified March 17, 1886, and on motion of Charles H. Moore, attorney for said relator,

Ordered, That a writ of *certiorari*, according to the prayer of said petition, issue out of and under the seal of this Court, directed to Hon. Alfred C. Chapin as Comptroller of the State of New York, and returnable at the office of the Clerk of Albany County within twenty days after the service thereof.

Enter.

A. B. PARKER,
J. S. C.

People ex rel. Equitable Life vs. Chapin.

The People of the State of New York on the relation of The Equitable Life Assurance Society of the United States, to Alfred C. Chapin, as Comptroller of the State of New York, greeting :

Whereas, We have been informed by the verified petition of the Equitable Life Assurance Society of the United States, and the affidavit of Frank E. Smith, both sworn on the 17th day of March, 1886, that the said Assurance Society is the owner and holder of a mortgage upon one hundred and eighty acres of land in the northeast corner of Lot No. 18, Township No. 3, Old Military Tract, town of Black Brook, Clinton County ; that said land was sold for unpaid taxes by the Comptroller of the State, at the tax sales of 1877 and 1881, at each of which sales the People of the State became the purchaser ; that the said Assurance Society made application to you on the 20th day of November, 1885, to cancel each of said sales, pursuant to the statute in such case made and provided, upon the ground that said sales and each of them were illegal and invalid, and submitted evidence to you showing such illegality and invalidity, which application you denied and refused to grant, and the said petitioner claims that such action on your part was illegal, and that it has been and is injured and aggrieved thereby :

And we being willing to be certified of your proceedings decisions and actions in the matter of the said application, and in denying and refusing the same, and all things appertaining thereto, do command you, that within twenty days after the service hereof upon you, you do certify and return to us at the office of the Clerk of Albany County, according to the provisions of title II., chapter 16, of the Code of Civil Procedure, all your proceedings and decisions in the premises, including the said application of The Equitable Life Assurance Society of the United States, to cancel the sales of one hundred and eighty acres of land in the northeast corner of lot No. 18, Township No. 3, Old Military Tract,

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town of Black Brook, Clinton County, made on the tax sales of 1877 and 1881; the affidavit of Charles H. Moore and John M. Wever, and the certificate of the Clerk of Clinton County, submitted to you with the said application; and also all records and documents on file in your office relating to the said sales or either of them, and all other papers or evidence before you on making your decision denying the said application, together with this writ; to the end that the proceedings, decisions and actions had and taken by you in the matter of the said application may be reviewed and corrected by our Supreme Court, and that we may further cause to be done thereupon what of right and according to law should be done.

Witness, Hon. Alton B. Parker, Justice of our Supreme Court, at Albany, N. Y., this 18th day of March, 1886.

[L. S.]

WM. D. STREVELL,
Clerk.

CHARLES H. MOORE,
Attorney for Relator,
Plattsburgh, N. Y.

Indorsed :

The within writ of certiorari is hereby allowed this 18th day of March, 1886.

A. B. PARKER,
J. S. C.

People ex rel. Equitable Life vs. Chapin.

To the Supreme Court of the State of New York :

The petition of the Equitable Life Assurance Society of the United States respectfully shows :

I.—That it is a corporation duly organized and existing under and by virtue of the Laws of the State of New York.

II.—That on or about the 27th day of November, 1873, Christopher F. Norton executed and delivered to your petitioner a mortgage to secure payment of the sum of fifty thousand dollars, which mortgage was upon and covered a parcel of one hundred and eighty (180) acres of land in the northeast corner of Lot eighteen (18), Township No. 3, Old Military Tract, in the town of Black Brook, county of Clinton, and also other lands, the entire amount of which said mortgage is now due and unpaid.

III.—That, as your petitioner is informed and believes, said parcel of one hundred and eighty acres of land was sold by the Comptroller of this State at the tax sale of 1877 for the unpaid taxes of the years 1866, 1867, 1868, 1869 and 1870, and at such sale was bid in by the Comptroller and thereafter conveyed by him to the People of this State.

That at the sale of 1881, the said parcel of land was again, in form, sold and conveyed by the Comptroller to the People of this State for the unpaid taxes of the years 1871, 1872, 1873, 1874, 1875 and 1876.

IV.—That, as your petitioner is informed and believes, on the 20th day of November, 1885, an application was duly made to the Hon. Alfred C. Chapin, as Comptroller of the State of New York, pursuant to the statute in such case made and provided, to cancel and set aside the said sales, and each of them, as illegal and invalid, which application was in the words and figures following ; that is to say :

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IN THE MATTER

of

The Application of THE EQUITABLE
LIFE ASSURANCE SOCIETY OF THE
UNITED STATES, to cancel the tax
sales of 1877 and 1881 as to a
portion of Lot No. 18, Township
No. 3, Old Military Tract, town
of Black Brook, Clinton County.

To Hon. ALFRED C. CHAPIN, *Comptroller of the State of
New York* :

SIR—On the affidavits of Charles H. Moore and John M. Wever, and the certificate of the Clerk of Clinton County, which are herewith submitted to you, you are requested to cancel the sale of one hundred and eighty acres of land in the northeast corner of Lot No. eighteen (18), Township No. three (3), Old Military Tract, situate in the town of Black Brook, Clinton County, N. Y., made by the Comptroller to the People of this State on the tax sale of 1877 for unpaid taxes of the years 1866, 1867, 1868, 1869 and 1870, on the ground that the assessment for taxation in said town of Black Brook, for the year 1869, was irregular and illegal in that the oath of the Assessors of said town, to the assessment-roll of that year, was sworn before a notary public, and not before a Justice of the Peace of said town, as required by law ; and also that the said oath so taken by said Assessors is not the oath in form or in substance required by the statute.

You are also requested to cancel the sale of the said one hundred and eighty (180) acres of land made at the tax sale of 1881, by the said Comptroller to the People of this State for unpaid taxes of the years 1871, 1872, 1873, 1874, 1875 and 1876, on the ground that at said

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tax sale said property was treated by the said Comptroller as already belonging to the State by force of the said tax sale of 1877, and that no opportunity was afforded to other persons to bid upon the same.

You are also requested to appoint a time and place for the hearing upon this application at which said Assurance Society may have an opportunity to present further evidence, and be heard by counsel in support of this application, and to give reasonable notice thereof to said Society, or its attorney.

Yours respectfully,

CHARLES H. MOORE,
Attorney for The Equitable
Life Assurance Society,
Plattsburgh, N. Y.

V.—That the following is a copy of the affidavit of Charles H. Moore referred to in said application and submitted to the Comptroller therewith, namely,

“STATE OF NEW YORK, { ss. :
County of Clinton, {

Charles H. Moore, being duly sworn, says that he is an attorney at law, and resides at Plattsburgh, N. Y., and is the attorney both in fact and at law for The Equitable Life Assurance Society of the United States.

That said Equitable Life Assurance Society of the United States is the owner and holder of a mortgage upon one hundred and eighty acres (180) of land in the north-east corner of lot eighteen (18), Township No. three (3), Old Military Tract, in the town of Black Brook, County of Clinton, which mortgage was executed by Christopher F. Norton and wife, and is dated November 27th, 1878, and that at the time of the execution of said mortgage, the said Norton was the owner in fee of the said mortgaged premises as appears by the records in the office of the Clerk of the County of Clinton; that said mortgage covers other lands; that there is upwards of fifty thou-

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said dollars due on said mortgage, and that a suit has been brought by said Equitable Life Assurance Society to foreclose the same, and that a decree of foreclosure has been granted in the said action, but that no sale has yet been had.

The said lot number eighteen (18) aforesaid is now and for upwards of twenty years last past, has been situated in the town of Black Brook; that deponent is informed and believes, that said one hundred and eighty acres in the northeast corner of said Lot Number eighteen (18), Township Number three (3), Old Military Tract, was sold by the Comptroller at the tax sale of 1877 for unpaid taxes of the years 1866, 1867, 1868, 1869, 1870, and that the same has since been conveyed by said Comptroller to the People of the State, and that said one hundred and eighty acres were also, in form, sold by the Comptroller to the People of the State of New York at the tax sale of 1881, for unpaid taxes of 1871, 1872, 1873, 1874, 1875, 1876, and has since been conveyed by the Comptroller to the People of the State, as appears by the records in the office of the Comptroller.

That deponent was present at said tax sale of 1881, desired and offered to bid upon said one hundred and eighty acres, but that Col. S. W. Parks, the representative of the Comptroller who conducted said sale, refused to accept or receive any bid from deponent, upon the ground, as then stated by said Parks, that the said one hundred and eighty acres belonged to the State by reason of the aforesaid purchase of the same at the said tax sale of 1877, and conveyance thereof to the People of the State thereunder, as aforesaid.

That deponent is advised the effect of chapter 448 of the Laws of 1885, will be to perfect the title of the People of this State to said one hundred and eighty acres, derived from said tax sales of 1877 and 1881, by cutting off the right now secured by law to said Assurance Society of procuring the cancellation of said sales unless such cancellation is made by the Comptroller before the

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9th day of December, 1885, for which reason deponent asks an order to show cause returnable in less than eight days, why a mandamus should not issue requiring the Comptroller to cancel said tax sales and decds.

That no previous application for such order to show cause has been made.

That deponent is informed and believes that at the time of the tax sale of 1881 the State had no title to or interest in said one hundred and eighty acres, except such as it derived from said tax sale of 1877.

CHARLES H. MOORE.

Subscribed and sworn to before me this 16th day of November, 1885, by Charles H. Moore to me known and whom I certify to be a credible person.

M. F. PARKHURST,
Notary Public, Clinton Co."

VI.—That the following is a copy of the affidavit of John M. Wever, referred to in said application, and submitted to the Comptroller therewith :

STATE OF NEW YORK, { ss. :
Clinton County, }

John M. Wever, being duly sworn says, that he is the Treasurer of the County of Clinton, and as such Treasurer has the possession and custody of the assessment roll of the town of Black Brook, in said county, for the year 1869. That Schedule "A" hereto annexed is a true and correct copy of the oath of the assessors attached to the assessment roll of said town of Black Brook for the year 1869, and of the whole thereof.

J. M. WEVER.

Subscribed and sworn to before me this 6th day of November, 1885, by John M. Wever, to me known and whom I certify to be a credible person.

W. L. WEVER,
Notary Public.

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SCHEDULE "A."

CLINTON COUNTY, }
Town of Black Brook, } ss.

We the undersigned do severally depose and swear, that we have set down in the foregoing assessment roll all the real estate situated in the town of Black Brook according to our best information, and that with the exception of those cases in which the value of said real estate has been changed by reason of proof produced before us, we have estimated the value of said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt from a solvent debtor; and also that the said assessment roll contains a true statement of the aggregate amount of the taxable personal property of each and every one named in such roll, over and above the amount of debt due from such persons respectively and excluding such stock that is otherwise taxable, and such other property as is exempt by law from taxation, at the true and full value thereof, according to our best information and belief.

PHILIP ENGLISH, }
SAMUEL BULLEN, } Assessors.
ISAAC W. LAKE, }

Sworn to and subscribed before me }
this 24th of September, 1869. }

BENJ. E. WELLS,
Notary Public.

VII.—That the following is a copy of the certificate of the Clerk of Clinton County referred to in said application, and submitted therewith to the Comptroller:

"STATE OF NEW YORK, }
Clinton County Clerk's Office, } ss. :

I, John P. Brennan, Clerk of the County of Clinton, hereby certify that I have made diligent search in my office

People ex rel. Equitable Life vs. Chapin.

for a certificate of the election of Benjamin E. Wells, as a Justice of the Peace, for any term of office as such justice, which included the year 1869, and that there is no record in this office of the election or qualification of Benjamin E. Wells, as a Justice of the Peace for the town of Black Brook in said county, for or during the year 1869; but that the records of this office show that during the entire year 1869, Philip English, Elijah White, Daniel B. Hayes and John Daisey, persons of whom said Wells was not one, were the duly elected and qualified Justices of the Peace of the said town of Black Brook.

Witness my hand and official seal this 14th
day of November, 1885.

[L. s.]

J. P. BRENNAN,

Clerk,

By J. N. LANDRY, Dep."

VIII.—That, as your petitioner is informed and believes, on said 20th day of November, 1885, the said Alfred C. Chapin, as Comptroller, as aforesaid, rendered a decision denying the said application for the reason that the grounds upon which the cancellation of said sales was asked, were insufficient in point of law, even if true in fact.

IX.—That, as your petitioner is advised by counsel, the said decision of the Comptroller was erroneous, and contrary to the evidence submitted to him and contrary to law.

Wherefore, your petitioner prays that a writ of certiorari may be allowed, and be issued out of, and under the seal of this Honorable Court, directed to the aforesaid Alfred C. Chapin as Comptroller of the State of New York, commanding him, the said Comptroller, to certify and return to this Court all and singular his proceedings, actions and decisions in the premises, together with copies of the said application for cancellation of the sales of said parcel of

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one hundred and eighty acres of land, made at the tax sales of 1877 and 1881, as aforesaid, and of the affidavits of Charles H. Moore and John M. Wever, and the certificate of the Clerk of Clinton County referred to in said application, and submitted therewith to the Comptroller as aforesaid; and also of any documents or records in the office of the said Comptroller in anywise relating to the said sales of said parcel of land, or either of them.

To the end that the said decision and proceedings of said Alfred C. Chapin, as Comptroller of the State of New York, may be reviewed and corrected by this Honorable Court, and that the aforesaid error committed by him may be corrected, according to law, and that his decision aforesaid may be reversed and set aside.

And your petitioner will ever pray.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF
THE U. S.

By CHAS. H. MOORE,
Agent.

STATE OF NEW YORK,)
Clinton County.)

Charles H. Moore, being duly sworn, says that he is the agent of the Equitable Life Assurance Society, and as such has charge of the lands owned by or mortgaged to it, in the County of Clinton. That he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the sources of deponent's information and the grounds of his belief as to the matters not therein stated upon his knowledge, are the records and documents on file in the office of the Comptroller, and the accompanying affidavit of Frank E. Smith.

People ex rel. Equitable Life vs. Chapin.

That the reason this verification is not made by the said petitioner is that it is a corporation.

CHAS. H. MOORE.

Sworn to before me this 17th)
day of March, 1886. }

S. A. KELLOGG,
Clinton Co., Judge.

STATE OF NEW YORK,)
County of Clinton.) ss. :

Frank E. Smith, being duly sworn, says :

I.—That he is an attorney and counselor-at-law, and is counsel for The Equitable Life Assurance Society in this proceeding.

II.—That on the 20th day of November, 1885, as counsel for said Society, and in its behalf, he submitted to Hon. Alfred C. Chapin, as Comptroller of the State of New York, an application to cancel the sale of one hundred and eighty acres of land in the northeast corner of Lot No. 18, in Township No. 3, Old Military Tract, in the town of Black Brook, County of Clinton, made by the Comptroller on the tax sales of 1877 and 1881.

III.—That he has read the foregoing petition verified by Charles H. Moore, March 17, 1886, and that it correctly recites the said application, and the affidavits of Charles H. Moore and John M. Wever, and the certificate of the Clerk of Clinton County, upon which said application was made, and which were submitted with it to the Comptroller.

IV.—That on the 20th day of November, 1885, the said application was denied by the said Comptroller, for the reason that the grounds upon which the cancellation of

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said sales was asked were insufficient in point of law, even if true in point of fact.

V.—That no other or previous application for a writ of certiorari has been made herein.

FRANK E. SMITH.

Sworn to before me, this 17th
day of March, 1886.

S. A. KELLOOG,
Clinton Co. Judge.

SUPREME COURT,

ALBANY COUNTY.

The People of the State of New
York, on the relation of THE
EQUITABLE LIFE ASSURANCE SO-
CIETY OF THE UNITED STATES,

vs.

ALFRED C. CHAPIN, as Comptroller
of the State of New York.

The answer or return of Alfred C. Chapin, as Comptroller of the State of New York, to the writ of *certiorari* hereto annexed.

By virtue of and in obedience to the writ of certiorari hereto annexed, and to me directed, I do hereby certify and return to the Clerk of Albany County, as Clerk of the General Term of the Supreme Court in and for the Third Judicial Department of the State of New York, in the city of Albany: That, on the 20th day of November, 1885, a petition was made to Alfred C. Chapin, the Comptroller

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of the State of New York, by The Equitable Life Assurance Society of the United States, praying for the cancellation of the sale of one hundred and eighty acres of land, in the northeast corner of Lot Number eighteen (18), Township No. 3, Old Military Tract, situate in the town of Black Brook, Clinton County, N. Y., which petition is in the following words :

IN THE MATTER

of

The Application of THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, to cancel the tax sales of 1877 and 1881, as to a portion of Lot No. 18, Township No. 3, Old Military Tract, town of Black Brook, Clinton County.

To Hon. ALFRED C. CHAPIN, Comptroller of the State of New York :

SIR—On the affidavits of Charles H. Moore and John M. Wever, and the certificate of the Clerk of Clinton County, which are herewith submitted to you, you are requested to cancel the sale of one hundred and eighty acres of land in the northeast corner of Lot No. eighteen (18), Township No. 3, Old Military Tract, situate in the town of Black Brook, Clinton County, N. Y., made by the Comptroller to the People of this State on the tax sale of 1877 for unpaid taxes of the year 1866, 1867, 1868, 1869 and 1870, on the ground that the assessment for taxation in said town of Black Brook, for the year 1869 was irregular and illegal in that the oath of the assessors of

People ex rel. Equitable Life vs. Chapin.

said town to the assessment-roll of that year was sworn before a notary public, and not before a Justice of the Peace of said town as required by law, and also that the said oath so taken by said assessors is not the oath, in form or in substance, required by the statute.

You are also requested to cancel the sale of the said one hundred and eighty (180) acres of land made at the tax sale of 1881, by the said Comptroller to the People of this State for unpaid taxes of the years 1871, 1872, 1873, 1874, 1875 and 1876, on the ground that at said tax sale said property was treated by the said Comptroller as already belonging to the State by force of the said tax sale of 1877, and that no opportunity was afforded to other persons to bid upon the same.

You are also requested to appoint a time and place for the hearing upon this application, at which said Assurance Society may have an opportunity to present further evidence, and be heard by counsel in support of this application and to give reasonable notice thereof to said Society or its attorney.

Yours respectfully,

CHARLES H. MOORE,
Attorney for the
Equitable Life Assurance Society,
Plattsburgh, N. Y.

STATE OF NEW YORK, { ss.
County of Clinton. }

Charles H. Moore, being duly sworn, says, that he is an attorney-at-law and resides at Plattsburgh, N.Y., and is the attorney both in fact and at law for The Equitable Life Assurance Society of the United States. That said Equitable Life Assurance Society of the United States is the owner and holder of a mortgage upon one hundred and eighty (180) acres of land in the northeast corner of Lot eighteen (18), Township No.

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three (3), Old Military Tract, in the Town of Black Brook, County of Clinton, which mortgage was executed by Christopher F. Norton and wife, and is dated November 27, 1873, and at the time of the execution of said mortgage the said Norton was the owner in fee of the said mortgaged premises as appears by the records in the office of the Clerk of the County of Clinton. That said mortgage covers other lands. That there is upwards of fifty thousand dollars due on said mortgage, and that a suit has been brought by said Equitable Life Assurance Society to foreclose the same, and that a decree of foreclosure has been granted in the said action, but that no sale has yet been had. That said lot No. eighteen (18) aforesaid is now and for upwards of twenty years last past has been situated in the town of Black Brook. That deponent is informed and believes that said one hundred and eighty acres in the northeast corner of said Lot No. eighteen (18), Township No. three (3), Old Military Tract, was sold by the Comptroller at the tax sale of 1877, for unpaid taxes of the years 1866, 1867, 1868, 1869, and 1870, and that the same has since been conveyed by said Comptroller to the People of the State, and that said one hundred and eighty acres were also in form sold by the Comptroller to the People of the State of New York, at the tax sale of 1881, for unpaid taxes of 1871, 1872, 1873, 1874, 1875 and 1876, and has since been conveyed by the Comptroller to the People of the State, as appears by the records in the office of the Comptroller.

That deponent was present at said tax sale of 1881, desired and offered to bid upon said one hundred and eighty acres, but that Col. S. W. Parks, the representative of the Comptroller, who conducted such sale, refused to accept or receive any bid from deponent, upon the ground as then stated by said Parks, that the said one hundred and eighty acres belonged to the State by reason of the aforesaid purchase of the same at the said tax sale

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of 1877, and conveyance thereof to the People of the State thereunder as aforesaid.

That deponent is advised, the effect of chapter 448 of the Laws of 1885, will be to perfect the title of the People of this State, to said one hundred and eighty acres derived from said tax sales of 1877 and 1881, by cutting off the right now secured by law to said Assurance Society, of procuring the cancellation of said sales unless such cancellation is made by the Comptroller before the 9th day of December, 1885, for which reason deponent asks an order to show cause returnable in less than eight days why a mandamus should not issue requiring the Comptroller to cancel said tax sales and deeds.

That no previous application for such order to show cause has been made. That deponent is informed and believes that at the time of the tax sale of 1881, the State had no title to, or interest in, said one hundred and eighty acres, except such as it derived from said tax sale of 1877.

CHARLES H. MOORE.

Subscribed and sworn to before me, }
this 16th day of November, 1885, }
by Charles H. Moore, to me known }
and whom I certify to be a credi- }
ble person, }

M. F. PARKHURST,
Notary Public,
Clinton Co.

STATE OF NEW YORK, }
Clinton County. } ss.:

John M. Wever being duly sworn, says that he is the treasurer of the County of Clinton, and as such Treasurer has the possession and custody of the assessment-rolls of the town of Black Brook in said County for the year 1869. That schedule "A" hereto annexed is a true and correct copy of the oath of the

People ex rel. Equitable Life vs. Chapin.

assessors attached to the assessment rolls of said Town of Black Brook for the year 1869, and of the whole thereof.

JOHN M. WEVER.

Subscribed and sworn to before me this }
6th day of November, 1885, by John }
M. Wever, to me known and whom }
I certify to be a credible person. }

W. L. WEVER,
Notary Public.

SCHEDULE "A."

CLINTON COUNTY, }
Town of Black Brook, } ss.:

We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment roll all the real estate situated in the town of Black Brook according to our best information ; and that with the exception of those cases in which the value of said real estate has been changed by reason of proof produced before us, we have estimated the value of said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt from a solvent debtor ; and, also, that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal property of each and every one named in such roll, over and above the amount of debt due from such persons respectively, and excluding such stock as is otherwise taxable, and such other property as is exempt by law from taxation, at the true and full value thereof, according to our best information and belief.

PHILIP ENGLISH, }
SAMUEL BULLEN, } Assessors.
ISAAC W. LAKE, }

Sworn to and subscribed before me, {
this 24th of September, 1869. }

BENJ. E. WELLS,
Notary Public.

People ex rel. Equitable Life vs. Chapin.

STATE OF NEW YORK,
Clinton County Clerk's Office, } ss.:

I, John P. Brennan, Clerk of the County of Clinton, hereby certify that I have made diligent search in my office for a certificate of the election of Benjamin E. Wells, as a Justice of the Peace, for any term of office as such justice which includes the year 1869, and that there is no record in this office of the election or qualification of Benjamin E. Wells, as a Justice of the Peace for the town of Black Brook, in said County for or during the year 1869. But that the records of this office show that during the entire year 1869, Philip English, Elijah White, Daniel B. Hayes and John Daisey, persons of whom said Wells was not one were the duly elected and qualified Justices of the Peace of the said town of Black Brook.

Witness my hand and official seal this 14th
day of November, 1885.

[L. S.]

J. P. BRENNAN,

Clerk.

By J. W. LANDRY,

Deputy.

That on the 21st day of November, 1885, by an order of the Supreme Court, the Comptroller was ordered to show cause on the relation of the petitioner herein, on the 24th day of November, 1885, why a peremptory mandamus should not issue requiring him to cancel the sale of said 180 acres of land in Clinton County, hereinbefore referred to. That on that 24th day of November, 1885, the said motion was duly denied by the Special Term of the Supreme Court, whereupon relator appealed to the General Term, which on the 24th of January, 1886, duly affirmed said order of the Special Term.

That relator has appealed from said order of the General Term to the Court of Appeals, which appeal is now pending and undetermined.

And I further certify and return that the lands mentioned in the moving papers herein were sold for the

People ex rel. Equitable Life vs. Chapin.

non-payment of taxes returned by the County Treasurer of the County of Clinton for the years 1866, 1867, 1868, 1869 and 1870, and sold on the 10th day of October, 1877, and bid in by said Comptroller, for the State of New York, for the amount of said taxes, interest and expenses, amounting to the sum of \$116.35, there being no other bidder; that thereafter said land was again duly sold for the taxes thereon for the years 1871, 1872, 1873, 1874, 1875 and 1876, for the sum of \$768.93 taxes, interest and expenses due, and that at such sale the Comptroller, in pursuance of chapter 402 of the Laws of 1881, section 66, bid the same in for the State of New York, and refused to accept any other bid therefor; and the same has been duly conveyed to the State of New York, and that the only reason why said Comptroller has refused to cancel said tax sales, is that the Comptroller holds and decides, and is of the opinion that said sales were in all respects regular, and that the said Comptroller has no right by law, and is under no obligation, statutory or otherwise, to cancel said sale.

“ And I further certify that I have compared the annexed extracts from the books of tax sales of land of non-residents made by the Comptroller in the years 1877 and 1881, with the originals now remaining in this office, and that such extracts are correct transcripts therefrom, and contain all that is stated in said books relating to 180 acres northeast corner of Lot 18, Township 3, Old Military Tract, Clinton County; and I further certify that no part of said 180-acre parcel has been redeemed from either of said sales, subsequent to the conveyance thereof to the State, and that no cancellation of either of said sales of any part of said 180-acre parcel has been made. All of which I do hereby certify and return as within I am commanded.

In Witness Whereof, I have hereunto subscribed
my name and affixed my official seal, at the
City of Albany, this 31st day of March, 1886.

[L. S.]

ALFRED C. CHAPIN,
Comptroller.

People ex rel. Equitable Life vs. Chapin.

STATE OF NEW YORK, { ss. :
Albany County. }

I, William D. Strevell, Clerk of Albany County, do hereby certify that I have compared the foregoing copies of writ of *certiorari*, order for the same, and petition and papers upon which the same was granted, and the return of Alfred C. Chapin, as Comptroller thereto, with the originals of the same papers, all of which are on file in my office ; and that the same are true copies of the said originals, and of the whole thereof.

Witness my hand and official seal, this
day of November, 1886.

[L. S.]

WM. D. STREVELL,
Clerk.

People ex rel. Equitable Life vs. Chapin.

At a General Term of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the City Hall, in the City of Albany, on the 16th day of November, 1886.

Present—HON. WILLIAM L. LEARNED, *Presiding Justice*; HON. J. S. LANDON, HON. AUGUSTUS BOCKES, *Associate Justices*.

SUPREME COURT.

THE PEOPLE OF THE STATE OF
NEW YORK *ex rel.* THE EQUITA-
BLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

vs.

ALFRED C. CHAPIN, as Comptrol-
ler of the State of New York.

This cause being upon the present calendar of this Court, upon a *certiorari* heretofore issued by the Special Term of the Supreme Court, on the 18th day of March, 1886, and the return thereto made by the respondent, Alfred C. Chapin, as Comptroller of the State of New York, and coming on to be heard,

Now, after hearing Mr. Frank E. Smith, of counsel for Charles H. Moore, attorney for the relator, and Mr. J. W. Hogan, in behalf of the Attorney-General, counsel for Alfred C. Chapin, as Comptroller of the State of New York, and due deliberation being had thereon,

It is ordered that the determination of the respondent, Alfred C. Chapin, as Comptroller of the State of New

People ex rel. Equitable Life vs. Chapin.

York herein, be and the same hereby is, in all things affirmed, with \$10 costs.

A Copy.

WM. D. STREVELL,
Clerk.

SUPREME COURT.

THE PEOPLE OF THE STATE OF
NEW YORK *ex rel.* THE EQUITA-
BLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

vs.

ALFRED C. CHAPIN, as Comptrol-
ler of the State of New York.

A writ of *certiorari* having heretofore and on the 18th day of March, 1886, been issued out of the Supreme Court, at Special Term thereof, directed to the respondent, Alfred C. Chapin, as Comptroller of the State of New York, and requiring him to make return thereof at a General Term of this Court, and the respondent having made a return to said writ of *certiorari*, and the proceeding coming on to be heard at a General Term of the Supreme Court held at the City Hall in the City of Albany, on the 16th day of November, 1886, and an order having been made and entered by said Court, adjudging that the determination of the respondent, Alfred C. Chapin, as Comptroller of the State of New York, should be, and the same are, in all things, affirmed, with ten dollars costs,

Now, on motion of D. O'Brien, Attorney-General, attorney for the respondent, Alfred C. Chapin, as Comptroller of the State of New York,

People ex rel. Equitable Life vs. Chapin.

It is adjudged, that the determination of the respondent Alfred C. Chapin, as Comptroller of the State of New York, in said proceeding, be, and the same is, in all things affirmed, and that he recover the sum of ten dollars costs, and one dollar and twenty-five cents disbursements, in all eleven dollars and twenty-five cents, against the relator, The Equitable Life Assurance Society of the United States.

SIRS—Please take notice, that the foregoing is a copy of a judgment filed and entered in the office of the Clerk of Albany County on the 17th day of November, 1886.

Yours, etc.,

D. O'BRIEN,

Attorney-General and Att'y for Respondent.

To CHARLES H. MOORE,

Attorney for Relator.

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N. Y. SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW
YORK upon the relation of THE
EQUITABLE LIFE ASSURANCE SO-
CIETY OF THE UNITED STATES,

Appellant,

vs.

ALFRED C. CHAPIN, as Comptroller
of the State of New York,

Respondent.

SIRS—You will please take notice that The Equitable Life Assurance Society of the United States, the relator

People ex rel. Equitable Life vs. Chapin.

above named, hereby appeals to the Court of Appeals from the final order and judgment of the Supreme Court, rendered at a General Term thereof, held in and for the Third Judicial Department, affirming the determination of Alfred C. Chapin, as Comptroller of the State of New York, brought up for review by this proceeding, which order and judgment were entered in the office of the Clerk of Albany County on the 17th day of November, 1886, and from each and every part of said order and judgment.

Dated November 20, 1886.

Yours, etc.,

CHARLES H. MOORE,
Attorney for Relator and Appellant,
Plattsburgh, N. Y.

To Hon. DENIS O'BRIEN,
Attorney-General and
Attorney for Respondent,
Albany, N. Y.

WILLIAM D. STREVELL, Esq.,
Clerk of Albany County,

THE PEOPLE *ex rel.* THE EQUIT-
ABLE LIFE ASSURANCE SOCIETY,

vs.

ALFRED C. CHAPIN, as Comp-
troller.

City and County of New York, *ss.* :

Frank E. Smith, being duly sworn, says : That he is the counsel for the relator in this proceeding. That no written

People ex rel. Equitable Life vs. Chapin.

opinion was rendered by the General Term in affirming the decision of the Comptroller herein.

FRANK E. SMITH.

Sworn before me, this 27th }
day of November, 1886. }

THOMAS TIERNEY,
Notary Public,
N. Y. Co.

STATE OF NEW YORK, }
Albany County, } ss. :

I, William D. Strevell, Clerk of Albany County, do hereby certify that I have compared the foregoing copies of order and judgment of the General Term, and the papers upon which the same were made, and notice of appeal therefrom, with the originals of the said papers now on file in my office, and that the same are correct transcripts therefrom and of the whole of said originals.

Witness my hand and official seal, this
day of December, 1886.

WILLIAM D. STREVELL,
Clerk.

People ex rel. Equitable Life vs. Chapin.

At a Special Term of the Supreme Court of the State of New York, held in the City Hall in the City of Albany on the 28th day of March, 1887.

PRESENT—The Hon. ALTON B. PARKER, *Justice Presiding*.

THE PEOPLE OF THE STATE OF
NEW YORK *ex rel.* THE EQUITA-
BLE LIFE ASSURANCE SOCIETY OF
THE UNITED STATES

against

ALFRED C. CHAPIN, as Comptroller
of the State of New York.

On reading and filing the Remittitur from the Court of Appeals to the Supreme Court herein, directing that the appeal from the judgment and order of the General Term herein, heretofore entered, be affirmed and the defendant recover the costs of the appeal to the Court of Appeals of the plaintiff appellants. Now on motion of Mr. D. O'Brien, attorney-general and attorney for plaintiff.

Ordered, that said decision be, and the same hereby is made the judgment of the Supreme Court and that judgment be entered herein affirming said judgment and order appealed from with costs in the Court of Appeals. Enter in Albany County.

A. B. PARKER,
Justice of the Supreme Court.

People ex rel. Equitable Life vs. Chapin.

SUPREME COURT,

ALBANY COUNTY.

THE PEOPLE OF THE STATE OF NEW
YORK *ex rel.* THE EQUITABLE
LIFE ASSURANCE SOCIETY OF THE
UNITED STATES

against

ALFRED C. CHAPIN, as Comptroller
of the State of New York.

An appeal having heretofore been taken to the Court of Appeals from the judgment and order of the General Term of the Supreme Court herein, entered November 17, 1886, in favor of the defendant and against the plaintiff, and said appeal having been duly considered by the Court and a decision having been rendered, whereby said judgment and order appealed from is affirmed with costs in that Court, to be recovered by the respondent of the appellant as appears by their Remittitur to this Court, which is this day filed.

Now, on reading and filing said remittitur, and the order of the Special Term of the Supreme Court held by Hon. Alton B. Parker, Justice of this Court, dated March 28, 1887, making the decision of the Court of Appeals the judgment of this Court, and the bill of costs of the defendant-respondent as taxed this day, and on motion of Mr. D. O'Brien, Attorney-General and attorney for defendant-respondent,

Ordered, that said judgment and order appealed from be and the same hereby is affirmed and that said defendant-respondent recover of the plaintiff-appellant the sum

People ex rel. Equitable Life vs. Chapin.

of one hundred and ten dollars and fifty-seven cents and have execution therefor.

ROBERT H. MOORE,
Clerk.

STATE OF NEW YORK, }
City and County of Albany Clerk's Office, } ss.:

I, James D. Walsh, Clerk of the said city and county, and also Clerk of the Supreme and County Courts, being courts of record held therein, do hereby certify that I have compared the annexe copy, Return Remittitur, Order and Judgment with the original thereof, filed in this office on the 29th day of March, 1887 and that the same is a correct transcript therefrom and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this 25th day of April, 1895.

[SEAL.]

JAMES D. WALSH,
Clerk.

Opinion : Millard vs. Roberts.

THE PEOPLE OF THE STATE OF
NEW YORK *ex rel.* JOHN H. MIL-
LARD *et al.*,

Appellants,

against

JAMES A. ROBERTS, Comptroller
of the State of New York,
Respondent.

(Decided January 26,
1897).

ARTHUR L. ANDREWS, for appellants ; T. E. HANCOCK,
for respondent.

O'BRIEN, *J.*—The relators applied to the Comptroller, alleging that they were the owners of certain lands in the County of Franklin, which had been sold for taxes in the year 1881, and bid in by the Comptroller for the State. They asked that the sale be cancelled and set aside on account of certain defects and irregularities specified in the moving papers.

The Comptroller denied the application, and the Appellate Division, upon *certiorari*, affirmed his determination. It is not necessary to notice the particular defects or irregularities in the sale that are claimed to constitute the grounds of the application, since, we think, the relators have no standing to make this application.

It has been repeatedly held by this Court that, in cases of tax sales of lands, the owner cannot reclaim the lands sold by such a proceeding as this. The Comptroller has no power to set aside the sale upon the application of the owner, since the statute was not intended for his benefit, but for the benefit of the purchaser who has paid his money to the State upon the

faith of a title supposed to be valid, but which turns out to be defective or void. Within recent years the statute of 1855 has been amended, but none of these amendments, in any way, aid the relators in this case. The objections which have been so often stated to the exercise of this jurisdiction, at the instance of the owner, still remain good (*People ex rel. Wright vs. Chapin*, 104 N. Y., 369; *People ex rel. Ostrander vs. Chapin*, 105 N. Y., 309; *Ostrander vs. Darling*, 127 N. Y., 70; *People ex rel. Hamilton Park vs. Wemple*, 139 N. Y., 240; *People ex rel. Witt vs. Roberts*, 144 N. Y., 234).

It will be seen upon a careful examination of these cases that they cover all the statutes now in force conferring power upon the Comptroller to set aside sales of lands for taxes, but none of them are yet comprehensive enough to enable an owner to repossess himself of the lands sold in such a way. If the sale is invalid, his title is not affected, and he may keep and defend his possession, or, if put out of possession, he may regain it by action of ejectment.

It is obvious that there was no intention to modify or disturb these decisions by anything that was said in the case of *People vs. Turner* (117 N. Y., 227; 145 N. Y., 451).

The case was correctly decided in the Court below, and the order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

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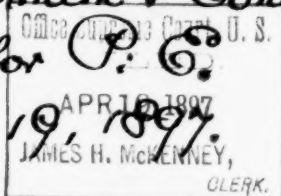
E. H. SMITH,
Reporter, C.

N^o 41.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

Reply Br. of Smith & Conway
for P. C.

Filed Apr. 19, 1897.



Supreme Court of the United States.

BENTON TURNER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF
NEW YORK,
Defendant in Error.

}
October Term,
1896.
No. 273.

Brief for Plaintiff in Error in Reply.

I.

It is repeatedly asserted in the brief of the learned Attorney-General of New York, that the land which is the subject of this controversy is the same land which was the subject of controversy between these parties in the action reported in 117 N. Y., 227. The apparent object of this assertion is to impeach the good faith of the plaintiff in error, in purchasing the land now in controversy (see Brief of Defendant in Error, pp. 5, 8, 19, 29). These statements are not warranted by anything in record, and the learned Attorney-General is entirely in error in regard to the fact. The subject matter of the former controversy between these parties—reported in 117 N. Y., 227—was

Lot No. 219, in Township No. 10, Franklin County, and that action in no way related to the land now in dispute—the southeast quarter of Township No. 24 (see 117 N. Y., at p. 230).

The further statements, at page 19 of Defendant's Brief, that Turner "took a deed of this land December 27, 1886, * * * apparently without consideration, and "after suit had been commenced against him," is contrary to the record, which shows that this action was begun April 11, 1887 (Record, p. 8). What consideration was paid does not appear, but on the Sheriff's sale, Turner perfected his title by payment of \$6,000 (Record, p. 50; twenty-seventh finding).

II.

The first point of the learned Attorney-General is devoted to an attempt to show that the defects in the tax sale were in the nature of irregularities, as distinguished from jurisdictional defects. But it is in substance conceded that *because* of these defects, whatever they may be called, the sale was invalid when it was made, and did not *of its own force* divest the former owner—Norton—of his title. It is nowhere suggested that the tax sale in question ever had vitality enough to stand alone. It is not claimed by the learned counsel for defendant that the case of *Westfall vs. Preston*, 49 N. Y., 349, was wrongly decided or that it has been overruled.

Neither can it be questioned that a material departure from the statute in the conduct of the proceedings leading up to the tax sale does, by the settled law of New York, render the sale *void*. The last decision of the New York Court of Appeals on this subject is *Classon vs. Baldwin*,

decided in March, 1897 (152 N. Y., 204, Advance Sheets of March 31). That action was ejectment, defendant claiming title under a tax sale. O'BRIEN, *J.*, says, all the judges concurring (p. 210):

"The proceedings were purely statutory, and the
 "title of the owner could not be divested without a
 "strict compliance with all the provisions of the
 "statute. In such cases every requisite of the statute
 "having the semblance of benefit to the owner must
 "be substantially, if not strictly, complied with."

We say, therefore, that it must be taken as an established, if not an admitted, foundation for our argument that notwithstanding the tax sale of 1877, and the deed thereon to the state, Norton, and after his death his heirs, continued to be seized in fee and in possession.

III.

It is next contended by the learned Attorney-General that the act in question may be sustained as a *cure* law, that is, as applied to this case, a law transferring the title from the Norton heirs to the State. We do not understand that a curative law, properly speaking, requires time to become operative. If the defective proceeding be within the reach of such a law, the cure is effectual the instant the law takes effect. In this aspect the six months' feature of the act in question is not material, or, perhaps, it should be said that the act by its terms did not take effect until six months after its passage. The vital point is that the title, which was in Norton the moment before the act took effect, is by operation of law transferred to the State.

It does not in the least change the effect or operation of such a law, if it be operative at all, to say that the deed which is sought to be "cured" was void by reason of irregularities merely. In such case, just as much as in the case of a deed void for jurisdictional defects, the title is transferred from one person to another by the legislative act.

Gilmore vs. Tucker (1891), 128 N. Y., 190, 200.

No case is cited by the learned Attorney-General which goes to the length necessary to sustain his contention. *Ensign vs. Barse*, 107 N. Y., 329, is the strongest in his favor. But in the subsequent case of *Cromwell vs. McLean*, 123 N. Y., 474, 490, the statute considered in the *Ensign* case is assumed to have been a statute of limitation as distinguished from a curative law.

In *William vs. Supervisors of Albany*, 122 U. S., 154, there was no question as to a sale of property. The statute there assailed only undertook to legalize taxes as such.

Geekie vs. Kirby Carpenter Co., 106 U. S., 384. *Coulter vs. Stafford*, 40 Fed. Rep., 266 (should be 48 Fed. Rep., 266), and *Land and River Improvement Co. vs. Bardon*, 45 Fed. Rep., 711, were all cases arising under limitation laws, and do not seem to have any bearing on the validity of the law now in question, considered as a curative law.

The *Bardon* case was affirmed by this Court, 157 U. S., 327.

Coulter vs. Stafford, will be found reversed in 56 Fed. Rep., 564.

In *McCready vs. Sarton*, 29 Iowa, 356, no question arose under a retroactive law. The statute there under consideration was section 794 of the Iowa Revision of 1860.

The tax deed which was held protected by its provisions was not made until 1866. No question arises in the present case, as to the effect or validity of the New York Statute as regards sales made after its passage, and, of course, with reference to its terms.

IV.

The third point of the learned Attorney-General is devoted to an attempt to show that the law in question considered as a limitation law, did not operate to deprive citizens of property without due process of law.

He says (p. 49 of Defendant's Brief):

"The owners and parties in interest had until the
"expiration of six months after June 5, 1885, to
"bring any action they desired to vacate the tax, or
"any sale, conveyance, or certificate made thereunder
"or to regain possession of the land."

It should be borne in mind that long before the Act of 1885 was passed the land had been sold and the deed to the People of the State of New York executed and recorded. The sale was in 1877, the deed was executed in 1881, and recorded in 1882 (Record, p. 10; Finding VI).

The remedies which the learned Attorney-General asserts were open to the land-owner during the six months allowed for the protection of his rights, seem to be as follows:

First—An action against the Comptroller to vacate the deed (Defts. Brief, Sub. Div. C, pp. 49 and 58).

Second—An action of ejectment against the Forest Commission (Defts. Brief, Sub. Div. D, pp. 50, 54, 58).

Third—A writ of mandamus to compel the Comptroller to take possession, under chapter 453 of the Laws of 1885, to the end that an action of ejectment might be brought against him (Defts. Brief, Sub. Div. E, p. 54).

Fourth—An action against somebody to remove a cloud from the title.

1. *Suit against the Comptroller to vacate the deed.*

This alleged remedy is sought to be founded upon the language of the act now in question. But, as we have shown in our principal brief, that act did not attempt to give any new remedy. It only provided that the deeds to be affected by it should be subject to cancellation "as now provided by law, on a direct application to the Comptroller or an action brought before a competent Court therefor," and even this could only be done on the two grounds specified, namely, actual payment of the taxes or the levying of them by a town having no power to tax the land (Appendix, p. 79). It is conceded that the "application" to the Comptroller, which the statute mentions, cannot be made by the land-owner (Defts. Brief, p. 59), and the learned counsel for the defendant says "it has been determined by that Court (*i. e.*, N. Y. Court of Appeals), "that the owner should commence a direct action "where the conflicting claims of all parties interested can "be determined by judicial decree" (p. 59 of Brief.) But it is plain that to such an action the "parties interested" must be made defendants, and the party interested in maintaining the tax sale is not the Comptroller, but the State. A suit to annul a deed without making the grantee in that deed a party, would be a novelty in equity practice.

It is too plain for discussion that to any action or suit to vacate the deed to the State, the State itself is an indispensable party.

Christian *vs.* Atlantic and North Carolina
R. R. Co., 133 U. S., 233, 241.

2. *Ejectment against the Forest Commission:*

To this we answer—

(a) The argument that the Forest Commission has actual possession of the land begs the whole question, inasmuch as it assumes the land to be in fact and in law the property of the State. (See pp. 37 and 38 of our principal brief.)

(b) If it be assumed that the effect of the Forest Commission Law was to place that Commission in actual possession of land not in fact and in law the property of the State, then the Forest Commission Law itself is unconstitutional and void. (See principal brief, pp. 38-40.)

(c) Assuming the Forest Commission to have been put in actual possession of the land by force of the statute creating it, still no action could have been brought to eject them from that possession. Such possession was plainly not the possession of the individuals comprising the Commission, but simply and solely the possession of the State.

The rule invoked in the *Arlington* case could have no application to such situation. If sued as individuals and as trespassers each could truthfully answer that he had never set foot upon the land.

The Trial Court has so found as a fact in this case. (Record, p. 10; Finding IX.)

The theory upon which ejectment has been maintained against officers and agents of the Government is that they are trespassers and wrongdoers by reason of their personal

and individual possession of the property. But to say that a man can be made a wrongdoer by operation of law is a contradiction in terms. It follows, therefore, that having no possession except that which the law casts upon them as representing the State, any suit to deprive them of that possession would be, in fact, a suit against the State, even though the State were not named as a party on the record.

Cunningham vs. Macon & Brunswick
R. R., 109 U. S., 446.

Hagood vs. Southern, 117 U. S., 52.

In re Ayers, 123 U. S., 443.

Christian vs. Atlantic & North Carolina
R. R., 133 U. S., 233.

North Carolina vs. Temple, 134 U. S., 22.

N. Y. Guaranty Co. vs. Steele, 134 U. S.,
230.

Pennoyer vs. McConaughy, 140 U. S., 1.

(d) Assume the Forest Commission to have acquired actual possession of the land in question by force of the statute creating it; and also assume that an action might have been maintained against that Commission by the true owner to recover possession; then, we say, that as the Forest Commission did not come into existence until September 14, 1885, the time allowed to bring such a suit—two months and twenty-four days—was so unreasonably short as to be a denial of justice.

The learned Attorney-General says: "There was no obstacle in the way to prevent the alleged owner of this property from commencing suit against the Forest Commission at once to test the title of the State to the lands in question" (Defts. Brief, p. 54).

If this language be intended to apply to the time when this six months' limitation began to run against the "al-

leged owner," it is not correct. There was a very material obstacle in the way of a suit against the Forest Commission. That Commission had not then been appointed.

The facts are as follows:

The law creating the Forest Commission went into effect May 15, 1885. It provided that there should be such a commission, to be appointed by the Governor by and with the advice and consent of the Senate. The Governor on the same day appointed Basselin, Dowd and James to be commissioners, and the Senate at once confirmed them. Dowd and James, however, declined to accept the office, and no further appointment was made until September 14, 1885, when Cox and Knevals were appointed in place of Dowd and James, declined.

It is true these facts do not appear on the record, but we think the Court will take judicial notice of the appointment of public officers and the date of their Commission.

Taylor on Evidence, American edition of
1897, sec. 18; Note 1, sec. 21, p. 18.

Brown vs. Piper, 91 U. S., 37.

Cary vs. The State, 78 Ala., 78.

The counsel for defendant in error, by asserting the existence of the Forest Commission during the six months between June and December, 1885, himself asks the Court to take judicial notice of the appointment of that Commission. The statute alone did not create it. Action by the Governor and Senate, and also by the appointees, was necessary. For the purpose of enabling the Court to ascertain conveniently the facts in this regard, we submit herewith a copy, certified by the New York Secretary of State, of the appointment of the original Commission, Basselin, Dowd and James, on May 15, 1885, the certificate of the Secretary of State of New York, showing that Dowd and James omitted to file the oath of office required by law; and also certified copies

of the commissions of Cox and Knevals, dated September 14, 1885, showing their appointment in place of Dowd and James, "declined." The constitution and statutes of New York require public officers to take and file with the Secretary of State a certain oath, and failing to do so their office is *ipso facto* vacant.

Constitution of 1874, Article XII.

Public Officers' Law, secs. 3, 10 and 20.

1 R. S., 9th ed., pp. 328, 333.

(2.) The *actual possession* of the Forest Commission may well be questioned, notwithstanding the very recent decision of the Court of Appeals, which is claimed to establish it. The Judge who wrote the opinion in the case of *People ex rel. Forest Commission vs. Campbell*, 152 N. Y., 51, does indeed say that the Court has so *decided* in the case of *People vs. Turner*, 145 N. Y., 451 (the case now under review). But it will be difficult for *this* Court, from an examination of the record and opinion before it, to come to the same conclusion. The ground upon which the judgment of the Court of Appeals in the present case was supposed to rest, *at the time it was rendered*, was that a remedy was given the land-owner during the six months, by application to the Comptroller to cancel the illegal sale; and the distinction was clearly drawn between cases in which the State had itself become the purchaser and cases of purchase by an individual. As regards the latter case, the power of the Comptroller to cancel was denied. As to the former, it was apparently asserted (see Record, p. 66). After that decision was rendered, it seems to have occurred to the Court that the result of it was to *validate* a number of cancellations which, under its prior decisions, were void, and thus deprive the State of a large quantity of land (see *People ex rel. Forest Commission vs. Campbell* [1894] 82 Hun, 338). To avoid this result, it was necessary to put the decision which had been rendered in the present case

on a different ground, and at the same time avoid the difficulty of denying all remedy to the former owner of forest lands. This the New York Court has attempted to do by declaring that the Forest Commission had "*actual possession*" of the land claimed by the State. This decision, holding as it does, that a *void* tax deed may of itself work a change of possession, is contrary to what had been for many years the settled law of the State.

Johnson *vs.* Elwood (1873), 53 N. Y., 431.

Thompson *vs.* Burhans (1874), 61 N. Y., 52.

Under the circumstances, the language of this Court in *Pease vs. Peck*, 18 How., 595, seems to be appropriate.

GRIER, J. (p. 599):

"When the decisions of the State Court are not
"consistent, we do not feel bound to follow the last,
"if it is contrary to our own convictions—and much
"more is this the case, where, after a long course of
"consistent decisions, some new light suddenly
"springs up, or an excited public opinion has elicited
"new doctrines subversive of former safe precedent.
"Cases may exist also where a cause is got up in a
"State court for the very purpose of anticipating our
"decision of a question known to be pending in this
"Court."

3. *Mandamus to compel the Comptroller to take possession.*

We cannot believe that the learned Attorney-General is serious in advancing this proposition. We are aware that the writ of mandamus is classed as an extraordinary remedy, but it would be an extraordinary use of even that extraordinary writ to issue it for the purpose of compelling the performance of an act which when done would be an infringement of the property rights of the relator invok-

ing the writ. Any land-owner seeking this remedy would be compelled to allege that as regards the land in question the State holds title; for it is only as to such lands that the Comptroller is authorized to take possession. The title of the State is the proposition which the land-owners deny.

4. *An action to remove a cloud from title.*

This is only another name for the action first suggested—to vacate the tax sale and deed. How it could have been maintained *against* the State, or how it could have been maintained *in the absence* of the State, the Court is not informed.

V.

The learned Attorney-General at the close of his brief seeks to charge some inconsistency upon the counsel for the present plaintiff by referring to the case of *Saranac Land and Timber Co. vs. Roberts*, 68 Fed. Rep., 521. That case was an action of ejectment against the Comptroller, in which counsel for the present plaintiff claimed the right to try the title of the State. And it is said that the reasoning of counsel is "peculiar" in asserting the right to try the title of the State in the action against the Comptroller, and denying it in an action against the Forest Commission.

We do not think there is any inconsistency to answer or explain. The Act of 1893, under which the action against *Roberts* is brought, gives express permission to sue him as representing the State. There is no such statute as to the Forest Commission.

Dated April 5, 1897.

FRANK E. SMITH,

THOMAS F. CONWAY,

Counsel for Plaintiff in Error.

IN SENATE—EXECUTIVE SESSION, May 15th, 1885.

The Governor having made the following nominations the same were duly confirmed and ordered to be transmitted.

To be Forest Commissioners, pursuant to the provisions of chapter two hundred and eighty-three of the Laws of 1885.

D. WILLIS JAMES,
WILLIAM DOWD,
THEODORE B. BASSELIN.

* * * * *

By Order of the Senate,

D. MCCARTHY,
President.

JOHN W. VROOMAN,
Clerk.

STATE OF NEW YORK, }
Office of the Secretary of State, { ss.:

I have compared the preceding Extract from Appointments by the Governor and Senate, 1883 to 1885, with the original on file in this office, and do hereby certify that the same is a correct transcript therefrom and the whole thereof, relating to Confirmation of Forest Commissioners May 15th, 1885.

Given under my hand and Seal of office of the Secretary of State, at the City of Albany this 24th day of March, in the year one thousand eight hundred and ninety-seven.

[L. S.]

ANDREW DAVIDSON,
Deputy Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State, } ss.:

I Hereby Certify, That I have made diligent examination in this office for the Oaths of Office of D. Willis James and William Dowd, appointed Forest Commissioners, May 15th, 1885, and that upon such examination, I find no Oaths of said D. Willis James and William Dowd as Forest Commissioners on file in this office.

Witness, my hand and the Seal of the Secretary of State, at the City of Albany, this 31st day of March one thousand eight hundred and ninety-seven.

[L. S.]

ANDREW DAVIDSON,
Deputy Secretary of State.

THE PEOPLE OF THE STATE OF NEW YORK, by the Grace of God free and independent: To all to whom these Presents shall come, Greeting:

Know Ye, That we have nominated, constituted and appointed, and by these Presents do nominate, constitute and appoint

SHERMAN W. KNEVALS,

Forest Commissioner

in the place of William Dowd, declined.

Hereby giving and granting unto him all and singular, the powers and authorities to the said office by law belonging or appertaining: To Have and to Hold the said office together with the fees, profits and advantages

to the same belonging, for and during the time limited by the Constitution and Laws of our said State.

In Testimony Whereof, We have caused these our Letters to be made Patent, and the great seal of our said State to be hereunto affixed. Witness, David B. Hill, Governor of our said State, at our City of Albany, the fourteenth day of September in the year of our Lord one thousand eight hundred and eighty-five.

[L. S.]

DAVID B. HILL.

Attested by

JOSEPH B. CARR,
Secretary of State.

STATE OF NEW YORK, {
Office of the Secretary of State, { ss. 2

I have compared the preceding copy of Commission by the Governor with the record thereof in this office, in Book Number 7, of Commissions by the Governor, at page 373 and I do hereby certify the same to be a correct transcript therefrom, and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, the 24th day of March one thousand eight hundred and ninety-seven.

[L. S.]

ANDREW DAVIDSON,
Deputy Secretary of State.

THE PEOPLE OF THE STATE OF NEW YORK, by the Grace
of God free and independent: To all to whom
these Presents shall come, Greeting:

Know Ye, That we have nominated, constituted
and appointed and by these Presents do nominate,
constitute and appoint

TOWNSEND COX,

Forest Commissioner

in place of D. Willis James, declined.

Hereby giving and granting unto him all and singular, the powers and authorities to the said office by law belonging or appertaining: To Have and to Hold the said office together with the fees, profits and advantages to the same belonging, for and during the time limited by the Constitution and Laws of our said State.

In Testimony Whereof, We have caused these
our Letters to be made Patent, and the
great seal of our said State to be hereunto
affixed. Witness, David B. Hill, Governor
of our said State, at our City of Albany, the
fourteenth day of September in the year of
our Lord one thousand eight hundred and
eighty-five.

[L. S.]

DAVID B. HILL.

Attested by

JOSEPH P. CARR,

Secretary of State.

STATE OF NEW YORK, }
Office of the Secretary of State, } ss. :

I have compared the preceding copy of Commission by the Governor with the record thereof in this office, in Book Number 7, of Commissions by the Governor at page 372 and I do hereby certify the same to be a correct transcript therefrom, and of the whole thereof.

Witness my hand and the seal of the office of the Secretary of State, at the City of Albany, the 24th day of March, one thousand eight hundred and ninety-seven.

ANDREW DAVIDSON,
Deputy Secretary of State.

No. 41.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

United States Supreme Court.

No. 41.—OCTOBER TERM, 1897.

BENTON TURNER, Plaintiff-in-Error,	}	Error to New York Court of Appeals.
<i>against</i>		
THE PEOPLE OF THE STATE OF NEW YORK, Defendant-in-Error.		

Petition for Rehearing or to Modify Judgment.

To the Honorable the Supreme Court of the United States:

The said Benton Turner, the plaintiff-in-error, comes now and respectfully petitions this Honorable Court for a rehearing of the above-entitled cause, or, in the alternative, for a modification of the judgment of affirmance rendered herein by this Court on October 18, 1897, so as to provide that such judgment shall be without prejudice to any application or motion which he may be advised to make in the courts of the State of New York for a re-argument of this cause therein upon questions of purely local and State law, for the following reasons, to wit:

Because this Court, as shown by the opinion of Mr. Justice Gray, assumes the Court of Appeals of New York to have decided that by the law of the State the plaintiff-in-error had the right, during the six months allowed by the limitation law, the validity of which was drawn in question before this Court, to assert his rights against the State in one or the other of three ways:

- (1) By application to the Comptroller to cancel the tax sale;
- (2) By ejectment against the Comptroller;
- (3) By ejectment against the Forest Commissioners.

Your petitioner respectfully suggests that this assumption as to the law of New York is a mistaken one; that the New York Court of Appeals has not so decided, and that, by the true construction of the laws of that State, neither one of these three assumed remedies existed in his favor. *First*—The remedy by cancellation, which was asserted by the New York Court of Appeals in rendering the judgment in this action, has since been denied by that Court. *Second*—The remedy by ejectment against the Comptroller presupposes that he was in possession of the land, but the record in this cause shows that such was not the fact. *Third*—The remedy by action against the Forest Commission has not yet been allowed by any New York Court. It presupposes the existence of such Commission, when in fact such Commission was not appointed until nearly four months after the passage of the limitation law in question.

Your petitioner further alleges that, on the argument of this cause in the New York Court of Appeals, the question of the right or possibility under the law of that State of bringing an action of ejectment against the Forest Commission to recover lands claimed by the State was not at all argued by his counsel; that up to that time no such

claim had ever been made, to his knowledge, or that of his counsel; that the judgment of the New York Court of Appeals in this action was understood by counsel to proceed upon the theory that the plaintiff-in-error might have applied to the Comptroller to cancel, which doctrine that Court has since denied. If now the judgment of the New York Court of Appeals is to be held to have proceeded on a different theory, and to have decided that plaintiff-in-error might have brought his action of ejectment against the Forest Commission, then a proper case is presented under the rules of the New York Court of Appeals for a re-argument of the cause, for the reason that such theory of this case was not argued by counsel, and a fact material to that aspect of the case was not brought to the attention of the Court, but was overlooked by both counsel and Court, namely, that during four of the six months in question there was no Forest Commission.

Your petitioner therefore prays that an order may be made for a re-hearing of the argument in this case on a day to be appointed by this Court, or else that the judgment of affirmance rendered herein be modified either by making it a judgment of dismissal simply or else by inserting in it a provision that it is without prejudice to the right of the plaintiff-in-error to move in the New York Court of Appeals for a re-argument of the cause in that Court upon questions of purely local law.

Dated New York, November 8, 1897.

BENTON TURNER,

By FRANK E. SMITH,
Counsel.

I hereby certify that I am counsel for the plaintiff-in-error in the above-entitled cause, and that the foregoing petition for a re-hearing of this cause, or, in the alternative,

for a modification of the judgment of this Court herein, is, in my opinion, well founded in point of law.

Dated November 8, 1897.

FRANK E. SMITH,
Counsel for Plaintiff-in-Error,
No. 21 Courtlandt Street,
New York.

To Hon. T. E. HANCOCK,
Attorney-General of the State of New York :

SIR—You will please take notice that on the 15th day of November, 1897, the petition and motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States, at the court-room thereof, in the Capitol at Washington, at the opening of the Court on that day, and a motion will then and there be made for leave to file the same and that the prayer of said petition be granted.

Annexed hereto is a copy of my brief or argument in support of the motion.

Dated November 8, 1897.

FRANK E. SMITH,
Counsel for Plaintiff-in-error.

Brief in Support of Petition for a Rehearing or to Modify the Judgment.

This is a writ of error to the New York Court of Appeals. It was argued in April, 1897, and decided October 18, 1897, and the judgment of the New York Court of Appeals affirmed. The mandate has not yet gone to the State Court.

The plaintiff-in-error now asks this Court to grant a rehearing or to so frame its judgment as to allow him to apply to the State Court for a reargument.

The only question which was presented to the Court related to the validity of a New York statute passed June 9, 1885, making tax deeds theretofore executed and which and been on record for two years conclusive evidence of their own validity, after the expiration of six months from the passage of the act.

The plaintiff-in-error challenged the validity of this law when set up by the State in its own favor, because during the six months he had no opportunity to assert his rights against the State.

The New York Court of Appeals held that he had such opportunity because he might have made an application to the Comptroller to cancel the illegal sale.

People vs. Turner, 145 N. Y., 451.

While the appeal to this Court was pending the New York Court of Appeals, in another case in which the action of the Comptroller in refusing to cancel an illegal sale was directly before the Court, held that the Comptroller had no such power on the application of the land-owner.

People ex rel. Millard vs. Roberts, 151 N. Y., 540.

Upon the argument of this cause one of the Justices of this Court asked the learned Attorney-General what the

remedy of the land-owner was during the six months allowed by the new limitation law, to which he responded, an action of ejectment against the Forest Commission.

In the opinion of this Court, delivered by Mr. Justice Gray, it is said :

" From the judgments of the Court of Appeals in
 " the case at bar, and in the subsequent case of *People*
 " vs. *Roberts*, 151 N. Y., 540, there would appear
 " to have been some difference of opinion in that
 " court upon the question whether his proper remedy
 " was by direct application to the comptroller
 " to cancel the sale, or by action of ejectment against
 " the comptroller or the forest commissioners. But
 " as that Court has uniformly held that he had a
 " remedy, it is not for us to determine what that
 " remedy was under the local constitution and laws."

It would seem, from this opinion, that this case has been decided by this court upon the *assumption* that the plaintiff in error had a remedy by the local laws against the State before the bar of the new limitation law fell, but what that remedy was this court does not determine.

The vital point in the case is, therefore, the existence of one of these three alleged remedies under *State law*. This the court does not decide but takes for granted.

It is respectfully submitted that the New York Court of Appeals has not yet decided that any one of these three remedies existed. It did decide, in rendering the judgment now under review, that the Comptroller had power to cancel in such a case as the present, but it has since denied this, and its last decision is *against* the existence of such a remedy.

The remedy by action of ejectment against the Comptroller is denied by the findings of fact contained in the record—the Comptroller was not in possession and could

not be ejected (Record, p. 10, Par. IX.). There remains only the action of ejectment against the Forest Commission. No such action has ever, to the knowledge of counsel, been brought to trial, and certainly there is no direct adjudication by any court of the State of New York that such an action could or can be maintained.

If the judgment in this case is to be made to rest on the assumed existence of *such* a remedy by the State law, this court ought to have better authority for its existence than the assertion of the Attorney-General or certain *dicta* to be found in recent opinions.

The question of the right of a person who, between June and December, 1885, claimed land in the Forest Counties, to bring an action of ejectment against the Forest Commissioners has never, to the knowledge of counsel, been decided by the New York Court of Appeals, unless the judgment now under review can be said to have proceeded on that ground. If it did, then under the rules and practice of the New York Court of Appeals, there are good grounds upon which to apply to that court for a re-argument, as the attention of the court was not directed to the fact that during four of the six months in question *there was no Forest Commission*—that it was not appointed until September 14, 1885 (see *Schenck vs. Peay*; Woolworth's Circuit Ct. Rep., 175). Counsel for plaintiff in error was not aware of this fact when this case was argued in the Court of Appeals, and that court was not informed of and plainly did not consider that aspect of the case.

We therefore ask the court, if it declines to itself rehear the cause, to so frame its judgment as to allow a motion for re-argument to be made to the New York Court of Appeals.

It may be that such a modification is unnecessary, as on writ of error to a State Court the whole case is not brought

here for review, but only the rulings of the State Court with respect to Federal questions.

Murdock vs. City of Memphis, 20 Wall.,
590.

Judgment of affirmance, which is, of course, final and conclusive upon all the questions which this court is authorized to review, ought not to preclude the State Court from correcting its own error as to State law.

The cause having been disposed of on the theory that the questions in the case were primarily questions of State law, the logical course would seem to be to dismiss the writ of error.

Bacon vs. Texas, 163 U. S., 207.

We therefore respectfully ask that a re-hearing be granted or the judgment modified by making it a dismissal simply, or if an affirmance, then that it be without prejudice to a motion for re-argument in the State Court on questions of State law.

Respectfully submitted,

FRANK E. SMITH,
Counsel for Plaintiff-in-Error.

[A copy of above petition, motion and brief was served on the Attorney-General of the State of New York on November 9, 1897, as appears by the proof of such service filed with the original.]

THE PEOPLE OF THE STATE OF NEW YORK

BRIEF FOR DEFENDANTS IN ERROR

T. E. BARTON

Attorney General, State of New York

Respondent for Defendants in Error

Capital, Albany, N. Y.

ALBANY:

THE SEAGRAM PRINTING CO. PRINTERS

1917

IN THE
SUPREME COURT

OF THE
UNITED STATES,

OCTOBER TERM, 1896.

No. 273.

BENTON TURNER, PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

T. E. HANCOCK,
Attorney-General, State of New York,
Counsel for Defendants in Error,
Capitol, Albany, N. Y.

ALBANY:
THE BRANDOW PRINTING CO., PRINTERS.
1897.



IN THE
SUPREME COURT
OF THE
UNITED STATES.

UNITED STATES SUPREME COURT.

BENION TURNER, PLAINTIFF IN ERROR,

agt.

THE PEOPLE OF THE STATE OF NEW
YORK, DEFENDANTS IN ERROR.

No. 273.

**Brief of Attorney-General, State of New York, on
behalf of Defendants in error, the People of
the State of New York.**

STATEMENT.

This case is brought into the Supreme Court of the United States for the purpose of reviewing the record, evidence and proceedings in pursuance of which the People of the State of New York obtained judgment against the plaintiff in error for the possession of a quantity of logs cut by him upon the lands of the People of the State (pp. 1, 2, 13, 14, 60, 61, 62), and involves the title to

7,500 acres in the Forest Preserve. The plaintiff in error disputes the title of the defendants in error to what is known and described as the southeast quarter of Township 24, Great Tract 1, Macomb's Purchase, Franklin county, New York (pp. 7, 8, 9, 17), and seeks to review upon this appeal the validity of certain statutes of the State of New York regulating the sale of nonresident lands for the nonpayment of taxes, and limiting the time for commencing actions or taking proceedings to vacate tax sales and conveyances for irregularities, or to recover possession of such lands. The land in dispute is the Forest Preserve of the State, and it is made a part of the duties of the Board of Fisheries, Game and Forests of said State to maintain and protect the same, and to promote as far as practicable the further growth of the forest therein. (Chap. 31, General Laws, Article XII, Banks & Brothers' 9th ed. New York Rev. Stat. pp. 917, 918.) The Forest Commission created by chapter 283, Laws 1885, is a continuous body, the present commission succeeding to the duties and authority of the old.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

The act creating the Forest Commission placed the State, through said commission, in actual possession, through the Comptroller's purchase and deed.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.
People v. Turner, 145 N. Y. 459.

The Constitution of the State also provides that the lands of the State constituting the Forest Preserve shall be forever kept as wild forest lands, and shall not be

leased, sold or exchanged, or taken by any corporation, and that the timber thereon shall not be sold, removed or destroyed.

Article VII, § 7.

The title of the defendants in error to this particular parcel of land has been twice declared by the courts of the State.

People v. Turner, 117 N. Y. 227.

People v. Turner, 145 N. Y. 459.

The particular complaint of the plaintiff in error is that chapter 448, Laws of 1885, of New York, is in contravention of the first section of the Fourteenth Amendment of the Federal Constitution in that it deprives persons of property without due process of law.

Chapter 427 of the Laws of 1855, as amended, provides for the collection of taxes upon lands of nonresidents and for the sale of such lands for unpaid taxes. The numerous provisions of this chapter relating to the duties of assessors, collectors, county treasurers, supervisors, the right of redemption and cancellation and the general method of collecting unpaid taxes need not be enumerated. Section 65 of said chapter 427, Laws of 1855, was amended by chapter 448, Laws of 1885, so as to read as follows :

“Such conveyances shall be executed by the Comptroller, under his hand and seal, and the execution thereof shall be witnessed by the Treasurer or Deputy Comptroller, and all such conveyances that have heretofore been executed by the Comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed

“thereby are located, and all outstanding certificates of a
 “tax sale heretofore held by the Comptroller that shall
 “have remained in force for two years after the last day
 “allowed by law to redeem from such sale shall, six months
 “after this act takes effect, be conclusive evidence that the
 “sale and all proceedings prior thereto, from and including
 “the assessment of the land, and all notices required by
 “law to be given previous to the expiration of the two
 “years allowed by law to redeem, *were regular and were*
 “*regularly given*, published and served according to the
 “provisions of this act, and all laws directing or requiring
 “the same, or in any manner relating thereto, and all other
 “conveyances or certificates heretofore or hereafter exe-
 “cuted or issued by the Comptroller, shall be presumptive
 “evidence of the *regularity* of all the said proceedings and
 “matters hereinbefore recited, and shall be conclusive evi-
 “dence thereof from and after the expiration of two years
 “from the date of recording such other conveyances, or of
 “four years from and after the date of issuing such other
 “certificates. But all such conveyances and certificates,
 “and the taxes and tax sales on which they are based,
 “shall be subject to cancellation, as now provided by law,
 “on a direct application to the Comptroller or an action
 “brought before a competent court therefor, by reason of
 “the legal payment of such taxes, or by reason of the
 “levying of such taxes by a town or ward, having no legal
 “right to assess the land on which they are laid.”

The provisions of the amendment were made applicable
 to various counties, including Franklin county, where the
 lands involved in this controversy are located. The act
 further provides that it shall not affect *any action, pro-*

ceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sales or any conveyance or certificate of sale made thereunder. This and similar statutes have been held by the courts of New York, as well as other States, and the United States courts, to be in no way in contravention of the Federal Constitution, and also held effective to limit the time within which actions shall be commenced, based upon technical omissions and irregularities not jurisdictional in their nature.

Sprecker v. Wakely, 11 Wis. 432.

Geekie v. Kirby Carpenter Co., 106 U. S. 379, 384.

Townsen v. Wilson, 9 Penn. 270.

Bronson v. St. Croix Lumber Co., 44 Minn. 251.

Williams v. Supervisors of Albany, 122 U. S. 163.

Coulter v. Stafford, 48 Fed. Rep. 266.

L. & R. Imp. Co. v. Bardou, 45 Fed. Rep. 706, 711.

Ensign v. Barse, 107 N. Y. 829.

Ostrander v. Darling, 127 N. Y. 70.

People v. Turner, 117 N. Y. 227.

People v. Turner, 145 N. Y. 451.

Allen v. Armstrong, 16 Iowa, 508.

Smith v. Cleveland, 17 Wis. 563, 571.

Freeman v. Thayer, 33 Maine, 83.

Raley v. Guinn, 76 Mo. 270.

Pillow v. Roberts, 13 How. 472.

The facts connected with the title of the defendants in error, the People of the State of New York, to the lands in controversy, and the various attempts of the plaintiff in error, Benton Turner, to defeat the same may be summarized as follows:

The premises were sold by the Comptroller of the State of New York for unpaid taxes of the years 1866, 1867,

1868, 1869 and 1870. The sale was held October 12, 1877. At the sale, the premises were bid in by the Comptroller in behalf of the defendants in error. The two years allowed for redemption expired October 12, 1879. The premises were deeded to said People of the State, June 9, 1881; the deed was recorded June 8, 1882 (p. 10).

Said Turner, without any claim or color of title to the premises, cut and carried away trees from the same from September 1, 1885, to September 1, 1886. Suit was commenced against him by the People December 29, 1886, to recover penalties for said illegal acts.

Cases Court of Appeals, vol. 1248.
People v. Turner, 49 Hun, 466.

The premises at the time of the levy of the taxes for the years 1866 to 1870, inclusive, were owned by Samuel W. Barnard and F. J. Barnard, who sold to one Norton, November 25, 1872. Six of Norton's heirs deeded to one John B. Riley, December 16, 1876. Mr. Turner, having been defeated in this action, while the said People, through the Forest Commission, were both constructively and actually in possession under said deed, procured a conveyance from said John B. Riley, dated December 27, 1886, over nine years after the conveyance to the People, and also, upon June 18, 1887, bought the premises at a sheriff's sale, upon a judgment obtained against a former owner of the property ten years before (p. 10). In the meantime, from September 1, 1886, to March 25, 1887, he continued to cut timber from the lands in question, on account of which the suit now under review was brought (p. 7).

People v. Turner, 145 N. Y. 451.

As will hereafter more fully appear, neither the owner nor any of his representatives ever made any complaint concerning the regularity of these taxes, or the proceedings thereafter taken in pursuance of which the property was sold and conveyed to the defendants in error, and no taxes were paid for a long period of time.

The owner, if he desired and felt himself aggrieved (Laws of 1851, chap. 176, § 5), might have appeared before the board of supervisors of Franklin county, at their annual meeting, for the purpose of having reviewed any assessments upon the property in question. He also had two full years to redeem after the sale of the property. (Laws 1855, chap. 427, § 50.)

Although the property was sold October 12, 1877, they had until December 9, 1885, to bring suit for the purpose of vacating the tax sale, or any conveyance or certificate of sale made thereunder. (Chap 448, Laws 1885, § 2.)

He could also bring ejectment against the Comptroller or Forest Commission of the State (Laws 1885, chap. 283, § 11; Laws 1885, chap. 453, § 4), or retain possession and defend his title. (People ex rel. Millard v. Roberts, 151 N. Y. 540.) He could sue to remove a cloud from the title.

These rights and remedies will be more fully discussed in the course of the argument. The owner did not avail himself of any of these statutory provisions enacted for his benefit, but the plaintiff in error seeks to defeat the title of the defendants in error upon the ground of certain irregularities, alleging that the owner has been deprived of his property without due process of law.

The Purpose, Scope and Intent of the Statute.

The counsel for the plaintiff in error declares that this statute "was intended to *validate all tax titles* existing in certain counties of the State," and that "it provided in substance that all deeds theretofore executed by the Comptroller upon any tax sale which had been on record for two years, should, after the lapse of six months from the passage of the act, *be conclusive evidence of their validity.*"

It is respectfully submitted that such a declaration is based upon a misinterpretation of the law, and that the statute under consideration makes no such provision. It neither assumes to validate all tax titles, nor does it make any deeds or conveyances conclusive evidence of their own validity. It does, however, provide that actions brought to set aside tax sales and conveyances, to recover possession of land, or intended to test the validity of tax sales, shall be brought within a specified time, where the only ground of complaint is that the proceedings were technically irregular, and that the statutes were not strictly pursued in every particular in imposing the tax and subsequent thereto. Neither the courts, nor the Legislature, nor the People of the State of New York, have attempted, as the counsel suggests, "to acquire the land of citizens for public use, in evasion of the constitutional requirement of just compensation."

As will be hereafter seen, the tax laws of the State of New York give ample opportunity to every property owner to pay his taxes, to redeem after his property has been sold, but limits the time within which actions can be brought to vacate tax sales and conveyances, to

assert title or to regain possession of the land when such actions are based upon technical irregularities. The statute does not affect jurisdictional defects, neither does it make a deed conclusive evidence of its own validity. In cases where the owner, or party interested, desires to avail himself of the benefit of an action to set aside a sale or conveyance, or to attack the title to land sold for the nonpayment of taxes, alleging as a cause of action mere irregularity in the proceedings of the taxing officers, he must commence suit within two years after recording the conveyance, which, in all cases, will give him at least six years after the taxes were assessed, and at least four years after the land was sold. The Comptroller is authorized to proceed to advertise and sell, when the tax remains unpaid for two years from the 1st day of May following the year in which the same is assessed. (See Appendix, p. 42, § 33.) The deed may be executed at the expiration of two years after the issue of the certificate of sale. (Appendix, p. 51, § 63.) The deed does not become evidence for any purpose until it has been recorded for two years. (See chap. 448, Laws 1855.) Of course, as a matter of practice, the times for selling lands by the Comptroller, issuing certificates and recording deeds, are much greater; we are giving here simply the minimum periods.

As to certificates of tax sales that had been outstanding for four years, or conveyances that had been recorded for two years at the time the law went into effect, the statute requires that all actions intended to attack the regularity of the sales and proceedings should be commenced within six months after the law became effective. The land in controversy in this case was sold October 12,

1877, and all parties interested therein had until December 9, 1885, to attack the regularity of the proceedings. It is to be remembered that the limitation does not apply to any case where the taxes have been paid, where there has been an assessment made by a wrong town or ward, where resident lands have been assessed as nonresident lands, where there has been an improper levy, or where there has been any other jurisdictional defect in the proceedings. The statute provides for cases where parties interested in lands have waited or desired to wait until lands sold for taxes have been improved by the purchaser or greatly enhanced in value, and who then, after a long period of years has elapsed, attempt to vacate tax sales and regain the property sold, on account of some technical irregularity in the proceedings. The statute, by limiting the time within which actions shall be commenced, protects, to some extent, purchasers at tax sales, including the State, from individuals who make a practice of buying up suits against the holders of lands purchased and held in good faith, and from owners who, after refusing or neglecting to pay their taxes for many years, desire to take advantage of technical defects in the proceedings.

General Provisions of the Tax Law.

The tax laws of the State of New York are liberal in their provisions. Many of their details are found in the appendix furnished by the counsel for the plaintiff in error. Generally speaking, the statute provides as follows (reference will be made to the statutes as they existed at the time chap. 448, Laws of 1885 went into effect):

1. The assessors must complete the assessment-roll on or before the 1st day of August, and post notices thereof, advertising that the rolls have been completed and filed with one of their number, at a specified place, where the same may be seen and examined until the third Tuesday of August, and that on that day they will meet to review their assessment. On the application of any person feeling himself aggrieved, they are required to meet at the time and place specified, and to hear and examine the complaints. (Appendix, p. 11, §§ 19 and 20.)

If the assessors neglect to meet, any person aggrieved by the assessment of the assessors may appeal to the board of supervisors at their next meeting, who shall have power to review and correct the assessment. (Laws of 1851, chap. 176, § 5.)

2. The county treasurer, when he receives from the collector an account of unpaid taxes assessed on lands of nonresidents, must before the 1st day of April next ensuing transmit the account to the Comptroller, who, if the tax remains unpaid for two years from the 1st day of May following the year in which the same was assessed, shall proceed to advertise and sell the land. (Laws of 1855, chap. 427, §§ 4 and 33; Appendix, pp. 34 and 42.) The sale must be advertised for ten weeks in newspapers of the county, in addition to publication in the State paper, also for twelve weeks successively in all the newspapers in the State designated for printing Session Laws. (Laws of 1855, chap. 427, §§ 34 and 41; Appendix, pp. 43-45.)

3. The owner or occupant, or any person interested in the land, may redeem the same at any time within two

years after the last day of the sale. The Comptroller must, at least six months before the expiration of the two years, cause notices to be published at least six weeks successively, and completed at least eighteen weeks before the expiration of the two years allowed for redemption, which notices are to be published in each county of the State, specifying each parcel of land unredeemed, the amount to be paid, and that the land will be conveyed to the purchaser unless redeemed by a certain day. If no person redeems the land at the expiration of the time specified, the Comptroller is authorized to convey the same to the purchaser, which vests in the grantee "an absolute estate in fee simple." If there is any person in occupancy of the land, or any part thereof, at the time of the expiration of the two years, the grantee, within two years of the expiration of the time to redeem, must serve a written notice on the occupant allowing the occupant, or any other interested person, six months additional time to redeem. (Laws of 1855, chap. 427, §§ 50, 61, 63, 68, 70; Appendix, pp. 47, 50, 51, 53, 54, 55.)

4. In case there has been a jurisdictional defect (either of omission or commission) in the proceedings of any of the officers, from the assessor to the Comptroller, the proceedings are void, and no attempt has been made to validate the same. The State, in common with many other States, has from time to time enacted laws providing for the cure of irregularities, and making the deed of conveyance, after certain periods of time, evidence that the sale and the prior proceedings were regular.

In cases where the purchasers at tax sales are individuals, the regularity of the proceedings and the validity of the tax title may be tested by a direct action. This is

true to the same extent where the State is a purchaser. This proposition will be discussed more at length later in the brief.

Laws 1855, chap. 448, § 2.

People ex rel. Millard v. Roberts, 151 N. Y. 540.

People ex rel. Forest Com. v. Campbell, 152 N. Y. 51.

Saranac Land and Timber Co. v. Roberts, 68 Fed. Rep. 521.

Clark v. Davenport, 95 N. Y. 477.

Hagner v. Hall, 10 App. Div. 581.

POINTS.

I.

The courts of the State of New York in construing the provisions of Chapter 448 of the Laws of 1885, and the provisions of the tax laws of that State, have held that the defects complained of by the plaintiff in error were irregularities and not jurisdictional in their nature, and that construction will be followed by the Federal courts. These defects were plainly technical irregularities.

The plaintiff in error attacks the proceedings by virtue of which the land was sold and conveyed to the State upon two grounds.

1. That the assessors of the town of Harrietstown, Franklin county, wherein the property was situated, in preparing the assessment-roll for the year 1867, subscribed the oath required by law, as to the correctness of

said roll on the 10th day of August of that year, instead of upon the third Tuesday of August.

2. That in the year 1870, the assessors of said town, after having prepared their assessment-roll for that year, did not meet on the third Tuesday of August, or thereafter, for the purpose of reviewing their assessment for that year.

A. Referring to the first complaint of the plaintiff in error that the oath relating to the correctness of the roll was verified upon the 10th of August.

In considering this alleged defect, the Court of Appeals, in the case of *The People v. Turner*, 145 N. Y. 456, says: "Referring now to the points taken by the appellant in objection to the right of the People to maintain their action against him, he claims that the tax sale of 1877 was illegal and void; for the reasons that the tax for the year 1867 was based on an assessment-roll verified before the third Tuesday of August, and, as to the tax for the year 1870, that the assessors had omitted to meet on the third Tuesday of August, as required by law. He further claims that these were jurisdictional defects which the act of 1885 could not cure, and he also asserts the unconstitutionality of the act. As to the first objection, relating to the proceedings of the tax assessors, I would observe, in the first place, that they were not jurisdictional defects, in any proper sense. They were irregularities in the proceedings for the assessment of the tax."

A similar question was considered in the case of *Ensign v. Barse*, 107 N. Y. 339, in which the court discusses numerous objections raised concerning the validity of the

tax sale, among others, the date of the verification of the assessors' certificate. With reference to this the court says: "The same answer awaits the fourth objection, which is founded upon the date of the assessors' certificate, indicating that it was made August 4, 1849. We are not quite sure that we understand correctly the appellants' brief upon this point. They seem to concede, that, as the law then stood, though it is different now, the roll could have legally been verified as early as the 1st day of August, and should have been verified 'forthwith.' That assumes that the verification was too late. But they also cite authority to show that it was too soon. This defect, if it was one, was also in the nature of an irregularity, which we need not consider further."

A similar question was considered in the case of *Parish v. Golden*, 35 N. Y. 462, relating to a defect in the verification by the assessors. The court says, at page 467: "There is nothing in the nature of the verification showing that it may not be made after the delivery of the assessment roll to the supervisors, as well as before, and I am of the opinion that the duty of verifying the assessment is to be regarded as directory, rather than jurisdictional."

It is to be observed that the first two cases above quoted from arise in connection with the validating acts of 1885 and 1882. It is also to be observed that none of the cases cited by the counsel for the plaintiff in error consider the effect of a curative statute.

While it may be true that an action brought within the time limited by the statute, to set aside or vacate the tax sale, on account of defective verification, would be sus-

tained, the lapse of time prescribed by the statute would bar the owner from setting up such irregularity, as against the tax deed. In other words, the party desiring to avail himself of the irregularity must commence his action before the statute of limitations has run.

In the case of *Terrell v. Wheeler*, 123 N. Y. 79, the court says: "After our decision in the case of *Breevort v. The City of Brooklyn*, 89 N. Y. 128, holding that certain tax impositions were void on account of defective verifications of the assessment-rolls by the assessors, the Legislature passed the act (Chap 363, Laws 1882) confirming the taxes theretofore imposed, and thereafter no tax in Kings county, assessed before the passage of that act, could be assailed on account of any irregularity. The taxes were not invalid for want of jurisdiction to impose them, nor because any constitutional right of the taxpayer had been disregarded or violated, but they were invalid because the law had not been strictly pursued in their imposition, and hence there was legislative competency to cure the defects and to confirm them. (*Clementi v. Jackson*, 92 N. Y. 591; *Ensign v. Barse*, 107 id. 329; *Williams v. The City of Albany*, 122 U. S. 154.)"

The premises described in the pleadings were sold by the Comptroller of the State of New York for unpaid taxes for the years 1866, 1867, 1868, 1869 and 1870, the amount remaining unpaid for taxes, including interest and expenses, being the sum of \$1,266.46. The premises were bid in by the Comptroller on behalf of the People of the State, and conveyed by him to them by deed dated June 9, 1881, which was recorded in Franklin county on the 8th day of June, 1882. (Fol. 28.) The Comptroller,

in making the sale, bidding in the property on behalf of the People of the State, in executing and recording the deed, followed the statutes of the State in every particular. (Laws 1855, chap. 427, §§ 66, 67, 68, 69, 70.) It is to be remembered that the plaintiff in error, with knowledge of all the facts, took a deed of this land December 27, 1836, nine years after the sale thereof to the State, apparently without consideration, and after suit had been commenced against him, and thereafter purchased the property upon a judgment which had been rendered ten years before, and secured a deed of the land which had been purchased by the State ten years after the State's title had been perfected. (Case, p. 10; 49 Hun, 466; 117 N. Y. 227; 145 id. 451.)

In other words, the plaintiff in error bought from a third person land the title to which had been in the State for many years, for the express purpose of litigating with the State its title to this particular property.

While it may be argued with considerable force that the copies of the assessment-roll offered in evidence were not sufficient to rebut the presumption that the officers discharged their duties in the precise form and manner prescribed by the statutes (*Chamberlain v. Taylor*, 36 Hun, 33; *People ex rel. Wright v. Chapin*, 38 id. 272; *Wood v. Knapp*, 100 N. Y. 112), it is confidently urged that, conceding that the oath was taken upon the 10th of August, instead of on or after the third Tuesday of August, this did not constitute a jurisdictional defect. It is not claimed that any injury was thereby sustained by the owner, and it would appear that the plaintiff in error, under the circumstances set forth in this case, can-

not urge that "The State is seeking, not to enforce collection of its revenues, but to acquire the land of its citizens for public use, in evasion of the constitutional requirement of just compensation."

The statute provides: "The assessors shall complete the assessment-rolls on or before the first day of August in every year, and shall make out one fair copy thereof, to be left with one of their number. They shall forthwith cause notices thereof to be left with one of their number; they shall forthwith cause notices thereof to be put up at three or more public places in their town or ward." (§ 19, Appendix, p. 11.)

"Section 20. Such notices shall set forth that the assessors have completed their assessment-roll, and that a copy thereof is left with one of their number at a place to be specified therein, where the same may be seen and examined by any person interested, until the third Tuesday of August; and that on that day the assessors will meet at a time and place also to be specified in such notice, to review their assessments. On the application of any person conceiving himself aggrieved, it shall be the duty of the said assessors on such day to meet at the time and place specified, and hear and examine all complaints in relation to such assessments that may be brought before them; and they are hereby empowered, and it shall be their duty, to adjourn from time to time, as may be necessary, to hear and determine, in accordance with the rule prescribed by section 15 of said title 2, such complaints; but in the several cities of this State, the notices, required by this section, may conform to the requirements of the respective laws regu-

"lating the time, place and manner for revising the assessments in said cities, in all cases where a different time, place, and manner is prescribed by said laws from that mentioned in this act." (Appendix, p. 11.)

It would appear to be a very plain proposition that the Court of Appeals was correct in holding that the fact of the assessors taking the oath upon the 10th day of August, did not constitute a jurisdictional defect, or such an omission that it could not be cured by a subsequent statute. We suppose it will be conceded that, "if the thing wanted or omitted, which constitutes the defect, is something, the necessity for which the Legislature might have dispensed with by a prior statute, or if something has been done or done in a particular way which the Legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute."

The earlier statutes of the State relating to the general duties of the assessors were similar to and framed upon the same general plan as the present statutes relating to that subject.

Chapter 72 of the Laws of 1799 provided for the completion of an assessment-roll by the assessors and the delivery of the same to commissioners on or before the first Tuesday of July and for leaving a copy with one of the assessors and posting notices in two or more public places in the city, ward or town, setting forth that the assessment had been completed and that a copy thereof had been left with one of the assessors, naming him and his place of business, where the same could be seen and examined by any of the inhabitants during ten days; and

further provided that, at the expiration of said time, the assessors should meet in a place specified, to review the assessment on the application of any person conceiving himself aggrieved, and contained various other provisions analogous to the present statute. But we do not find any provision requiring any certificate or oath upon the part of the assessors.

Later on (Revised Statutes 1827, chap. 13, § 25) the statute required a certificate upon the part of the assessors, but no oath.

At a later date, by chapter 176 of the Laws of 1851 (§ 18) a provision was inserted requiring the assessors, upon the completion of the roll, to take oath to the correctness of the same.

It will thus be seen not only that this requirement might have been dispensed with, but that it actually was dispensed with until the date last above mentioned.

As a matter of fact, it appears that notices were actually put up, and one of the assessors appeared at the proper place upon grievance day in the year 1867. He testifies as follows: "No one appeared on the day that I met to hear complaints to the assessment-roll of 1867; no grievance was made known to me as assessor; notices were put up." (P. 32.)

B. Neither was the neglect of the assessors to meet upon the third Tuesday of August, 1870, for the purpose of reviewing their assessments a jurisdictional omission. The property owners were not thereby deprived of their grievance day. Section 5 of chapter 176, Laws of 1851, makes provision for this very contingency:

Sec. 5. "If the assessors shall willfully neglect to hold
 "the meeting specified in the last preceding section, each
 "assessor so neglecting shall be liable to a penalty of
 "twenty dollars, to be sued for and recovered before any
 "court having jurisdiction thereof, by the supervisor of
 "the town for the use of the poor of the same town;
 "*and, in case of such neglect to meet for review, any per-*
 "*son aggrieved by the assessment of the assessors may*
 "*appeal to the board of supervisors, at their next meeting,*
 "*who shall have power to review and correct such*
 "*assessment.*"

The courts have held that it is enough if the law provides for a board of revision to hear complaints and prescribes the time and place for hearing such complaints. Thus it was held in *Palmer v. McMahon*, 133 U. S. 606:

"But it is argued that chapter 230 of the Laws of New York of 1843 is unconstitutional, as depriving the plaintiff in error of liberty and property without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. That amendment provides that no State 'shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' It is insisted that Palmer had no notice and no opportunity to be heard or to confront or cross-examine the witnesses for the taxing authorities or to subpoena witnesses in his own behalf, and had not otherwise the protection afforded in a judi-

“cial trial upon the merits. The phrase ‘due process of law’ does not necessarily mean a judicial proceeding. “‘The nation from whom we inherit the phrase ‘due process of law,’ said the court, speaking by Mr. Justice Miller, ‘has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation (McMillen v. Anderson, 95 U. S. 37, 41).’

“The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment can not be said to deprive the owner of his property without due process of law. (Spencer v. Merchant, 125 U. S. 345; Walston v. Nevin, 125 id. 578.) The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made (Hager v. Reclamation District, 111 U. S. 701, 710).”

In the case of Spencer v. Merchant, 125 U. S. 345, the court held :

“If the Legislature of the State, in the exercise of its power of taxation, directs the expense of laying out, grading or repairing a street to be assessed upon the

“owners of lands benefited thereby ; and determines the
 “whole amount of the tax, and what lands, which might
 “be so benefited, are in fact benefited ; and provides for
 “notice to and hearing of each owner, at some stage of
 “the proceedings, upon the question what proportion of
 “the tax shall be assessed upon his land ; there is no
 “taking of his property without due process of law, in
 “violation of the Fourteenth Amendment to the Consti-
 “tution of the United States.”

See also *Stuart v. Palmer*, 74 N. Y. 183.
Matter of Common Council, 126 N. Y.
 163.

In *People v. Turner*, 117 N. Y. 237, Judge Ruger said :
 “A manifest difference exists between the modes of
 “making assessments for local improvements and those
 “providing for annual taxation, and much reason exists
 “why a more formal notice should be given in one case
 “than the other. In one case they are special, transitory
 “and occasional, and in the other regular, fixed and of
 “annual occurrence, known to all people. In one case
 “they become public only when proceedings are insti-
 “tuted, and may escape the notice of the landowners.
 “In the other they occur every year and are as constant
 “in their recurrence as the changes of the seasons. Con-
 “ceding, therefore, the right of the taxpayers to this
 “opportunity, we think an examination of the statute
 “under which this tax was levied shows that he was not
 “deprived of such notice and opportunity to be heard as
 “the nature of the case required. The provisions of the
 “general statutes require that assessment-rolls in each
 “year shall be completed on or before the 1st day of

"August, and notices posted in the town that a copy
 "thereof has been made and left with one of the assessors,
 "where any person interested can see and examine the
 "same until the third Tuesday of August thereafter, and
 "that on that day the assessors will meet at a time and
 "place specified in such notice to review their assess-
 "ments. (2 R. S., 7th ed., 992, 993.) The notice required
 "by this act, it will be observed, is not personal, or of an
 "absolute character, but is constructive, and the provision
 "for a hearing of the taxpayers by the assessors is of a
 "most informal and indefinite character. It doubtless
 "gives the taxpayer a right to appear before the assessors
 "at the time stated, and endeavor to persuade them to
 "modify or abate his assessment. He may attempt to
 "swear off his assessment for personal property, but
 "beyond this a hearing does not seem to give him
 "any legal rights, or a denial of such hearing
 "inflict any absolute legal damage. Section 5, chapter
 "176 of the Laws of 1851, provides that in case of the
 "neglect of the assessors to meet for review, as required
 "by the statute, any person aggrieved by an assessment
 "may appeal to the board of supervisors at their next
 "annual meeting, who shall have power to review and
 "correct such assessment. The consequences of an
 "omission by the assessors to hold the meeting are thus
 "expressly declared, and would seem to deprive such
 "omission of any other effect than that given to it by
 "this statute. *Ample opportunity is thereby given the*
taxpayer, if he feels aggrieved in respect to assessments
of his property, to be heard before the board of super-
visors, who are vested with full power to afford all and

“ *any relief which was possessed by the assessors.* The taxpayer must be presumed to have knowledge of the provisions of public statutes ; and as the time and place for the meetings of the boards of supervisors are fixed by statute and occur at stated periods, we must presume that the Legislature intended such notice of the time and place for the hearing of dissatisfied taxpayers to be adequate notice of the opportunity to be heard.

“ As the primary object of the constitutional provision is to enable the property owner to be heard by some officer or tribunal, in respect to the taxing of his property, having power to relieve him before he can be deprived of it, he can not justly claim that he has been unlawfully assessed and taxed if such opportunity has been afforded him and he has negligently omitted to avail himself of it. It must be assumed that the taxpayers know the law of the State in respect to the time and method of assessing property and levying taxes ; and if they are presumed to know the provisions for the review of assessments, they must be equally presumed to know the remedy given by the law for an omission by the assessors to hold the meeting for such review.

“ We are, therefore, of the opinion that the opportunity afforded the taxpayer to appear before the board of supervisors and challenge the legality and fairness of his assessment was a satisfaction of his rights in respect to a hearing on the subject. It would have been competent for the Legislature, while authorizing the imposition of taxes, to have omitted altogether the provisions requiring notice and a meeting by the assessors to

" review assessments, and to have provided only for a
 " hearing before the supervisors in the first instance.
 " Having full authority over the subject, it could lawfully
 " provide for the way and manner of hearing the tax-
 " payer, and, in default of a hearing as provided, it could
 " declare the consequences of such default and provide
 " for a hearing in some equivalent mode. So long as the
 " taxpayer is given the equivalent therefor the Legisla-
 " ture has done all that is required of it under any view
 " of the taxpayer's constitutional rights. (Spencer v.
 " Merchant, 100 N. Y. 585.) It was held in the Matter
 " of De Peyster, 80 N. Y. 565, that an assessment for the
 " expenses of building a sewer is not invalid because of
 " omission to give to the owners of lots assessed a per-
 " sonal notice that an assessment is to be imposed. The
 " Legislature may prescribe what the notice shall be, and
 " when provision has been made for notice by publica-
 " tion before the final confirmation of the assessment, and
 " an opportunity afforded to make objections within a
 " time specified, and this has been complied with, no
 " constitutional right of the taxpayer has been violated
 " by such proceeding." *It, however, appears that no one*
appeared upon grievance day to make any complaint.
 (P. 32.)

We understand that as a general rule the Supreme
 Court of the United States, as well as all the Federal
 courts, will accept the construction of a State court in
 passing upon the meaning and application of a statute of
 the State. Thus it was said by Chief Justice Fuller, in
 Palmer v. McMahon, 133 U. S. 665: " We are bound by
 the decision of the Court of Appeals of the State of New

York adversely to the plaintiff in error, as to failure to comply with the State statute in relation to method of procedure, form of assessment, oath of assessors," etc.

- Amy v. Dubuque, 98 U. S. 470.
- Lamborn v. County Com., 97 U. S. 181.
- Harpensday v. The Dutch Church, 16 Peters, 455.
- Green v. Lessee of Neal, 6 Peters, 291.
- Gardner v. Collins, 2 Peters, 58.
- De Wolf v. Robaud, 1 Peters, 476.
- Cathcart v. Robinson, 5 Peters, 293.
- Bergman v. Bly, 66 Fed. Rep. 40.
- Sandford v. Poe, 69 Fed. Rep. 546.
- Christy v. Pidgeon, 4 Wallace, 196.
- Lane County v. Oregon, 7 Wallace, 71.
- State Railroad Tax Cases, 92 U. S. 618.
- Witherspoon v. Duncan, 4 Wallace, 217.

We have called attention to the alleged defects in the title of the defendants in error as preliminary to a consideration of chapter 448, Laws of 1885. *It is to be noted that neither the owner nor any one interested in the property at the time of the sale has ever questioned the title of the State, and that this land, apparently, has a record for nonpayment of taxes.* The State commenced an action against the plaintiff in error in December, 1886, to recover damages for cutting and carrying away trees from the Forest Preserve, and at that time plaintiff in error appeared in the capacity of a mere trespasser, showing no title, but claiming that by reason of certain alleged omissions of the assessors the Comptroller acquired no jurisdiction to make the sale, and that the State's title was defective. (See *People v. Turner*, 117 N. Y. 228; same case, 49 Hun, 466.) The same individual, after being defeated upon the trial before the referee and the Supreme Court (see 49 Hun, 466), pur-

chased an adverse title on the 19th day of February, 1889, inviting further litigation with the State and setting up the same defenses which he alleged in the other action. (Fol. 27.) In both cases he has urged the most technical of defenses, which, if available at all, were evidently intended to be for the benefit of the owner of the property, and not for the advantage of a person who was originally a stranger to the transaction, and who many years thereafter bought up or attempted to purchase an adverse title.

II.

Chapter 448 of the Laws of 1885 is valid as a curative statute and as a statute of limitation. Neither does it deprive any person of property without due process of law.

Chapter 448 of the Laws of 1885 was an amendment to section 65 of chapter 427 of the Laws of 1855, known as the General Tax Law of this State, and this amendment had reference to the effect to be given to certificates of tax sales made by the Comptroller and conveyances made by him in pursuance of such sales. It was intended to operate both as a curative statute and as a statute of limitations, requiring that actions commenced to vacate the tax sale or conveyance or to test the regularity of the same by ejectment or otherwise should be instituted within two years after recording the conveyance or four years after the sale, where the action was based upon irregularities and not upon jurisdictional defects. As to certificates of sale outstanding at the time the law went into effect and that had remained in force two years

after the last day allowed for redemption (four years from the date of their issue) the law provides that proceedings taken on actions commenced to vacate the tax sale or conveyance must be instituted within six months of the date of the law. The statute has no application to jurisdictional defects. The substance of such act so far as it is material is as follows:

"Sec. 65. Such conveyances shall be executed by the Comptroller under his hand and seal, * * * and all such conveyances that have heretofore been executed by the Comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands thereby conveyed are located, and all outstanding certificates of a tax sale heretofore held by the Comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale, shall, *six months* after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given * * * were *regular* and were *regularly* given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the Comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof * * * two years from the date of recording such other conveyances or four years from and after the date of issuing such other certificates."

This act, by its terms (§ 2), was made applicable to certain counties of the State of New York, among which was the county of Franklin, the county in which the lands which are the subject of this action are situated. "But shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken or application duly made within six months thereafter, for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder." The statute, it will be observed, refers to both applications and actions.

It is not claimed that the statute makes a deed or conveyance conclusive evidence of title or a cure of jurisdictional defects. The courts of New York have held directly the reverse, and have decided that this and similar statutes were intended to cure irregularities, and were not intended to and do not cure jurisdictional defects of such a nature that the Legislature could not have dispensed with the statutory requirement, a failure to comply with which constitutes the defect. The statute in terms simply provides for presumptive and conclusive evidence of *regularity* in the proceedings, limiting the time within which actions can be brought or proceedings taken, based upon irregularities in the proceedings. There is no claim made upon the part of the defendants in error or the courts of New York that the statute applies to cases where there has not been obtained jurisdiction of the subject-matter; where the tax has been levied by a town or ward having no legal right to assess the land; where the tax has been paid; where resident lands have been assessed as nonresident lands, where a part of the property in a

district has been assessed at one rate and a part at another; where there has not been a levy; where property in one district has been assessed by assessors in another district. But it is claimed that where each of the officers from the assessors to the Comptroller, has acquired jurisdiction, the Legislature may pass an act limiting the time within which proceedings shall be taken to vacate the tax sale or conveyance, when the action is based upon irregularities upon the part of the taxing officers.

In the case of *Ensign v. Barse*, 107 N. Y. 338, numerous irregularities were alleged, among them the date of verifying the assessment-roll. The court says:

"So far as these defects were not jurisdictional and
 "amounted only to irregularities, they were cured by the
 "act of 1882 (Chap. 287), which provided that where fif-
 "teen years had elapsed after a conveyance by the Comp-
 "troller or county treasurer of lands in Chautauqua or
 "Cattaraugus county belonging to nonresident owners,
 "and such owners had not entered into actual possession
 "of the same and made permanent improvements thereon,
 "the deed or conveyance should be 'conclusive' evidence
 "that 'the sale and all proceedings prior thereto, from
 "and including the assessment of the land and all notices
 "heretofore or hereafter required by law to be given,
 "previous to the expiration of the time allowed by law
 "to redeem, were regular and were regularly given, pub-
 "lished and served according to the provisions of all laws
 "requiring and directing the same or in any manner
 "relating thereto.' * * * But it is further assailed
 "as retrospective in its operation and in violation of sec-
 "tion 6 of article 1 of the Constitution which provides

"that no person shall be deprived of life, liberty or prop-
 "erty without due process of law. The counsel on both
 "sides agree as to the legitimate range of a curative stat-
 "ute. They agree that a retrospective statute curing
 "defects in a legal proceeding where they are in their
 "nature irregularities only and do not extend to matters
 "of jurisdiction, is not void on constitutional grounds;
 "that if the thing wanting or omitted, which constitutes
 "the defects is something, the necessity for which the
 "Legislature might have dispensed with by prior statutes,
 "or if something has been done or done in a particular
 "way which the Legislature might have made immate-
 "rial, the omission or irregular act may be cured by a
 "subsequent statute. We see no reason to disagree with
 "the counsel in this general statement of the law, at least
 "for present purposes, though it may not be above criti-
 "cism or beyond exception. The act of 1882 does not
 "on its face purport to cure jurisdictional defects. It
 "raises a conclusive presumption of regularity, but leaves
 "the question of the assessors' jurisdiction and authority
 "unaffected. Thus understood, it comes within the rule
 "which counsel concede to be correct. It does not make
 "the tax deed conclusive evidence of a complete title, but
 "leaves open to the owner full right to assail the pro-
 "ceedings in any jurisdictional respect."

Again, in the case of *Joslin v. Rockwell*, 128 N. Y. 338,
 in which case it was claimed that the nonresident lands
 were occupied and that the taxes had been paid, *Peck-*
ham, J., says:

"In *Ensign v. Barse*, 107 N. Y. 329, the statute pro-
 "vided that, under certain circumstances named in the

“ act the Comptroller’s deed should be ‘conclusive evidence’ that ‘ the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices heretofore or hereafter required by law to be given, previous to the expiration of the time allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of all laws requiring and directing the same, or in any manner relating thereto.’

“ The plaintiffs here claim title under two deeds from the Comptroller to Gerritt Smith, executed by reason of sales of the land for nonpayment of taxes. In 1885, long subsequent to such sales and conveyances by the Comptroller, the Legislature passed the act known as chapter 448, of the laws of that year, and it was provided therein that after certain times therein stated, the deeds of the Comptroller executed upon sales for the nonpayment of taxes, should be ‘conclusive evidence’ that ‘ the sale of said lands and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same or in any manner relating thereto.’ The Comptroller’s deeds under which the plaintiff claims, were executed and recorded in due time, so as to come within the purview of this act.

“ It is evident that, upon the subject of the conclusive character of the Comptroller’s deed, the act of 1885

“ does not differ in any material respect from the act
 “ already quoted, and which was under discussion in the
 “ case of *Ensign v. Barse*, *supra*. It must, therefore,
 “ receive the same construction which was given the act
 “ in that case. It was there said that the act did not, on
 “ its face, purport to cure jurisdictional defects. Judge
 “ Finch, in the course of his opinion, declared that the
 “ act ‘raises a conclusive presumption of regularity, but
 “ leaves the question of the assessors’ jurisdiction and
 “ authority unaffected. Thus understood, it comes within
 “ the rule which counsel concede to be correct. It does
 “ not make the tax deed conclusive evidence of a com-
 “ plete title, but leaves open to the owner full right to
 “ assail the proceedings for any jurisdictional defect’
 “ This construction was concurred in by the whole court.
 “ Nothing in the cases of *People v. Turnaer*, 117 N. Y.
 “ 227, and *Ostrander v. Darling*, 127 N. Y. 70, enlarges
 “ the construction to be given the act of 1885.”

It may be stated as an indisputable proposition that a departure from the strict letter of a statute can not be said to be a jurisdictional defect, in a constitutional sense, which, had it been directed by statute, would not have rendered the statute unconstitutional, and that a curative statute may validate acts which the Legislature might originally have authorized, and limit the time within which actions to set aside tax sales based upon irregularities shall be commenced.

Thus Cooley, in his *Constitutional Limitations*, says (pp. 469, 470): “ But the healing statute must in all cases
 “ be confined to validating acts which the Legislature
 “ might previously have authorized. It can not make

"good retrospectively acts or contracts which it had and
 "could have no power to permit or sanction in advance.
 "There lies before us at this time a volume of statutes of one
 "of the States, in which are contained acts declaring certain
 "tax rolls valid and effectual, notwithstanding the fol-
 "lowing irregularities and imperfections: A failure in the
 "supervisor to carry out separately, opposite each parcel
 "of land on the roll, the taxes charged upon such parcel,
 "as required by law; a failure in the supervisor to sign
 "the certificate attached to the roll; a failure in the
 "voters of the township to designate, as required by law,
 "in a certain vote by which they had assumed the pay-
 "ment of bounty moneys, whether they should be raised
 "by tax or loan; corrections made in the roll by the
 "supervisor after it had been delivered to the collector;
 "the including by the supervisor of a sum to be raised for
 "township purposes without the previous vote of the
 "township, as required by law; adding to the roll a sum
 "to be raised which could not lawfully be levied by tax-
 "ation without legislative authority; the failure of the
 "supervisor to make out the roll within the time required
 "by law; and the accidental omission of a parcel of land
 "which should have been embraced by the roll. In each
 "of these cases, except the last, the act required by law
 "and which failed to be performed, might by previous
 "legislation have been dispensed with; and perhaps in
 "the last case there might be question whether the roll
 "was rendered invalid by the omission referred to, and if
 "it was, whether the subsequent acts could legalize it.
 "But if township officers should assume to do acts under
 "the power of taxation which could not lawfully be justi-

"fied as an exercise of that power, no subsequent legis-
 "lation could make them good. If, for instance, a part
 "of the property in a taxing district should be assessed at
 "one rate, and a part at another, for a burden resting
 "equally upon all, there would be no such apportionment
 "as is essential to taxation, and the roll would be beyond
 "the reach of curative legislation. And if persons or
 "property should be assessed for taxation in a district
 "which did not include them, not only would the assess-
 "ment be invalid, but a healing statute would be ineffect-
 "ual to charge them with the burden. In such a case
 "there would be a fatal want of jurisdiction; and even in
 "judicial proceedings, if there was originally a failure of
 "jurisdiction, no subsequent law can confer it."

It is to be noted that the word "jurisdictional" may be
 used in a modified sense. In *Ensign v. Barse*, 107 N. Y.
 346, the court says:

"Finally, passing over one or two suggestions that re-
 "quire no answer, our attention is called to the case of
 "Shattuck v. Bascom, 105 N. Y. 39. We there held a
 "defect in the assessor's affidavit fatal to the assessment.
 "We did not speak of the defect as jurisdictional, though
 "if we had, no collision of authorities would have re-
 "sulted. The opinion in the present case is careful not to
 "deny a possible fatal result of the defect, although it is
 "rather formal than substantial, but for the curative
 "effect of the statute of 1882, which had no parallel in
 "any form in the facts of the cited case. In the opinion
 "then delivered the defect was not deemed jurisdictional
 "in any other sense than the modified one of an essential
 "condition under the law *as it stood*. Whether it was so
 "jurisdictional as that the Legislature could not have

“dispensed with it, and, therefore, could not cure its omission, is a very different inquiry. *A defect may be in one sense jurisdictional relatively to the authority of the assessors acting under the existing law, and yet not so as it respects the power of the Legislature to pass a statute curing the defect; it is only by confusing these two things which the opinion separated, that a seeming contradiction can be reached.*”

The learned counsel for the plaintiff in error not only fails to recognize the distinction made by the courts of New York, but apparently seeks to give a force and meaning to the curative statute of 1885, which is not claimed for it by the defendants in error here, which was not intended by the Legislature, and which has not been given it by the courts, which have construed this legislation so clearly that there is no room for misapprehension.

Ensign v. Barse, 107 N. Y. 338.

Joslyn v. Rockwell, 128 N. Y. 388.

People v. Turner, 145 N. Y. 457.

In the latter case the court says:

“Referring now to the points taken by the appellant, in objection to the right of the People to maintain their action against him, he claims that the tax sale of 1877 was illegal and void; for the reasons that the tax for the year 1867 was based on an assessment-roll verified before the third Tuesday of August and, as to the tax for the year 1870, that the tax assessors had omitted to meet on the third Tuesday of August, as required by law. He further claims that these were jurisdictional defects, which the act of 1885 could not cure, and he also asserts the unconstitutionality of the

"act. As to the first objection, relating to the proceed-
 "ings of the tax assessors, I would observe, in the first
 "place, that they were not jurisdictional defects in any
 "proper sense. They were irregularities in the proceed-
 "ings for the assessment of the tax. Some confusion of
 "thought may be occasioned by the unguarded language
 "of Chief Judge Ruger in *People v. Turner*, 117 N. Y.
 "227, who speaks of the irregular proceedings by the
 "assessors as jurisdictional defects. But it is very clear that
 "he did not intend the full force of that expression and
 "that he used those words in the sense in which they
 "were used by Judge Finch in *Ensign v. Barse*, 107 N.
 "Y. 329. In the latter case it was held that those
 "defects, only, which went to the jurisdiction and
 "authority of the assessors were not cured by the act of
 "1882. The defect there considered was the defective
 "date of the assessors' certificate and that was deemed to
 "be in the nature of an irregularity, merely. In *Joslyn*
 "v *Rockwell*, 125 N. Y. 338, it was held that the act of
 "1885, now in question, did not differ, in any material
 "respect, from the act of 1882, which was discussed in
 "*Ensign v. Barse*. The defects, which the appellant here
 "points out in the proceedings of the tax assessors, are
 "not unlike in their effect, to those which were relied
 "upon in his former case. There they consisted of the
 "alleged omission by the assessors to give notice of a
 "review of the assessments in the years referred to, or
 "to hold a meeting for such purpose, as required by the
 "statute, and in closing and verifying the assessments
 "prior to the time provided by law. Those irregularities
 "of the assessors were considered by Judge Ruger in

“connection with the effect to be given to the Comp-
 “troller’s deed, after a certain lapse of time, under the act
 “of 1885. It was held that the act, in its principal aspect,
 “was one of limitation, and that, as such, it was within
 “the constitutional power of the Legislature to enact as
 “affecting future cases, and, as well, existing rights.”

The Supreme Court of the United States, speaking of
 chapter 345, Laws of 1883, State of New York, a
 validating act, says:

“The irregularities in the assessment for the years
 “1876, 1877 and 1878, in that no entry of any assessment
 “of the shares of the plaintiff and of the stockholders whose
 “claims were assigned to him was made on the assess-
 “ment roll of those years until after the 1st of Septem-
 “ber, and after the time for revising and correcting the
 “assessment had passed, and in the defect of the oath
 “annexed in its averment as to the estimate of the value
 “of real estate, were, in our judgment, cured by the
 “validating act of April 30, 1883. The power of taxation
 “vested in the Legislature is, with some exceptions,
 “limited only by constitutional provisions designed to
 “secure equality and uniformity in the assessment. The
 “mode in which the property shall be appraised, by whom
 “its appraisement shall be made, the time within which
 “it shall be done, what certificate of their action shall be
 “furnished, and when parties shall be heard for the cor-
 “rection of errors, are matters resting in its discretion.
 “Where directions upon the subject might originally have
 “been dispensed with, or executed at another time,
 “irregularities arising from neglect to follow them may
 “be remedied by the Legislature, unless its action in this

respect is restrained by constitutional provisions prohibiting retrospective legislation."

Williams v. Supervisors of Albany, 122 U. S. 163.

Statutes of the kind under consideration have been repeatedly construed by the courts. The Supreme Court of the United States, in discussing the Wisconsin statute, says: "The statute applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed the statute puts at rest all objections raised, after the time specified, against the validity of the tax proceeding, from and including the assessment of the land to and including the execution of the deed. If the deed is valid on its face, and purports to convey the land on a sale for the non-payment of taxes, it is, during the three years, *prima facie* evidence of the regularity of the tax proceeding, and, after the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. The general authority of the taxing officers and the liability of the land to taxation having existed, there was no want of authority to put the taxing power in motion. That being so, the lapse of time establishes conclusively the validity of the tax and of the sale, as against the irregularity in question. There having been jurisdiction all error was conclusively barred by the statute. This construction is that held by the Supreme Court of Wisconsin in regard to this statute, in *Oconto County v. Jerrard*, 46 Wis. 317, and *Milledge v. Coleman*, 47 *id.* 184. It is said, and correctly, in the latter case, that

"that is the view which has been uniformly taken of that statute by that court, and that to adopt a contrary view would disturb numerous titles. Such construction was, therefore, always a rule of property in respect to land in Wisconsin, and is one which this court will follow."

Geekie v. Kirby Carpenter Co, 106 U. S. 384.

In the case of *Coulter v. Stafford*, 40 Fed. Rep. 266, the court held:

"Code Wash., § 2939, providing that no suit for the recovery of lands sold for taxes shall be commenced more than three years after the recording of the tax deed, is a complete defense to a suit brought after that time, when the recorded deed is valid upon its face; and plaintiff can not show that deed is void by reason of irregularities in the prior proceedings."

In the case of *The Land and River Imp. Co. v. Bardon*, 45 Fed. Rep. 711, the court said: "The effect of the statute is to cut off all inquiry into the title or the regularity of the proceedings on which the deed is founded, so that defects in those proceedings which might otherwise avoid the deed can not be made available. If a tax has been levied by competent authority, and has not been paid, a valid record and the running of the statute shuts out all inquiry into the regularity of the proceedings, in other respects, and bars the former owner's rights. The statute, as applicable to a case like this, has been so often construed and so long settled that it seems quite needless to go over the ground at this late day, and I shall content myself by a brief reference to some of the

"cases which, in my judgment, furnish the rule for the one at bar: *Edgerton v. Bird*, 6 Wis. 527; *Falkner v. Dorman*, 7 id. 383; *Knox v. Cleveland*, 13 id. 245; *Parish v. Eager*, 15 id. 532; *Swain v. Comstock*, 18 id. 463; *Sprecher v. Wakely*, 11 id. 432; *Hill v. Kricke*, id. 442; *Dean v. Earsley*, 15 id. 100; *Whitney v. Marshall*, 17 id. 174; *Gunnison v. Hoehne*, 18 id. 268; *Lawrence v. Kenney*, 32 id. 281; *Wood v. Meyer*, 36 id. 308; *Oconto Co. v. Jerrard*, 46 id. 317. See, also, *Coleman v. Lumber Co.*, 30 Fed. Rep. 317, where the United States Circuit Court for the eastern district of Wisconsin followed the same rule laid down in the foregoing cases."

In a recent case (*Hagner v. Hall*, 10 App. Div. 581, 2d Dep. N. Y. Sup. Ct.) the court comments upon irregularities as distinguished from jurisdictional defects (p. 585):

"In the case before us the owners had ample opportunity for hearing before the board of assessors. If, therefore, the defect in this case was only an irregularity the statute of 1885 was constitutional, and has rendered the taxes valid. I am not inclined to enter into subtle discussion or nice distinction between defects that are irregularities and those that are jurisdictional. In the decided cases are to be found expressions condemning defects in the levying of taxes as jurisdictional, which undoubtedly the Legislature could cure by subsequent laws. As pointed out by Judge Finch, in *Ensign v. Barse*, *supra*, there are defects which may be deemed jurisdictional under the law as it stands, yet not so jurisdictional that the Legislature may not subsequently cure them. It becomes necessary, therefore, to examine the

character and effect of proceedings for the taxation of lands of resident owners under the general system of the State. If they are proceedings to tax the land itself I should be inclined to admit that the error in the imposition of taxes laid on the plaintiff's land was an irregularity only, or at least not so jurisdictional as to be beyond the reach of subsequent legislation."

In Cooley's Constitutional Limitations (6th ed.), at page 457, the author says:

"The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

As already appears, the oath of assessors not only might have been dispensed with, but was actually not required until 1851.

McCreadie v. Saxton, 29 Iowa, 399, is a leading case. It was there held that the Legislature might prescribe the time and manner in which the essential jurisdictional acts of the tax officers should be done.

These essential jurisdictional acts are enumerated to be:

- 1st. The listing of the property for taxation.
- 2nd. The assessment or ascertainment of value of the property.

3rd. The levying of the tax.

4th. The warrant for its collection.

5th. The sale for nonpayment of taxes.

These are deemed jurisdictional matters and can not be dispensed with, but the Legislature can prescribe the time or manner in which each shall be done, and in this respect "the discretion of the Legislature is absolute and supreme, and can not be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end, or that no person shall question the legality of the manner; or that any subsequent act or fact shall be either *prima facie* or conclusive evidence that the law as to time or manner was complied with."

The counsel has correctly stated that the land under consideration was a wild forest. As will more fully appear in our third point, the State, before the enactment of chapter 442 of the Laws of 1885, was in actual possession of this land in controversy through its Forest Commission and other State officials. In all cases the owner of nonresident lands which have been sold for nonpayment of taxes has at least six years after the assessment to attack the proceedings on account of irregularities. The account for unpaid taxes must be certified to the Comptroller by the county treasurer before the 1st of April, after it has been returned as uncollected. (Appendix, p. 34, § 4.) The Comptroller proceeds to sell after the expiration of two years. (Appendix, p. 42, § 33.) After payment by the purchaser a certificate is issued. (P. 47, § 46.) The owner has two years to

redeem. (P. 47, § 50.) If not redeemed in two years a deed is given to the purchaser. (P. 51, § 63.) By chapter 448, Laws of 1885, as to certificates that had then been outstanding two years after the last day allowed by law to redeem and deeds that had been recorded for two years, the time was extended ^{Six months} ~~two years~~. As to other sales the term is fixed at four years after the certificate is issued and two years after the conveyance is recorded. It would appear that the time allowed to individuals desiring to avail themselves of technical irregularities was sufficient. As Ruger, J., said in 117 N. Y., p. 240: "It would seem that the right of a property owner to assert his title to property claimed by him, after such ample opportunities to protect such right had been afforded, could be regulated by a law of limitation without incurring the objection that his property had been taken without due process of law."

This is especially true when we remember that the State has afforded the property owner and all persons interested in the land abundant opportunity to test the title of the State to any land purchased for it at a tax sale. (See Point III.)

"With reference to the six months' provision, it operates, as to all existing cases, as a limitation upon the taxpayer's right to assert his claim under pre-existing laws, and, as to all future cases, provides that the lapse of two years from recording shall make that which was before presumptive evidence only, conclusive upon the rights of the parties. The act seems to be, in its principal aspect, one of limitation, and, as such, is within the constitutional power of the Legislature to enact as affecting future

cases, and, we think, within settled rules, equally within its power as to existing rights. It gives, in all cases, a time for the person aggrieved to establish his rights unaffected by the provisions of the enactment; but provides that after the lapse of a certain time the Comptroller's deed shall be conclusive evidence of the regularity of the proceedings upon which it is based. Legislation of such a character has frequently been held within the constitutional power of the Legislature to enact."

People v. Turner, 117 N. Y. 232-3.

The authority of the Legislature of the several States to pass laws limiting or changing the time within which actions may be commenced has been frequently announced as to need no discussion.

Hart v. Lampshire, 3 Peters, 280.

Hawkins v. Barney, 5 Peters, 457.

Sohn v. Watterson, 17 Wall. 596.

Terry v. Anderson, 95 U. S. 628.

Koshkonog v. Burton, 104 U. S. 668.

Sanger v. Nightingale, 122 U. S. 184.

Rexford v. Knight, 11 N. Y. 308.

Hand v. Ballou, 12 N. Y. 541.

Howard v. Moot, 64 N. Y. 262.

III.

Applying the foregoing propositions to the case of the plaintiff in error, it appears that neither he nor his grantors have been deprived of property without due process of law.

A. If it be the law that it was requisite for the assessors to make oath after the third Tuesday in August, and if it be the fact that such oath was not so taken in 1867, but was taken upon August 10th, it is confidently

urged that such omission was not jurisdictional, but a mere irregularity; the alleged defect was cured by chapter 448, Laws of 1885, and any action based upon this should have been commenced within six months after the law went into effect.

B. Parties owning or interested in the property were deprived of no constitutional or substantial right by reason of the failure of the assessors to meet or take oath on the third Tuesday of August, 1870. Chapter 176, Laws of 1851, § 5, contemplated this very contingency, and provided that, "any person aggrieved by the assessment of the assessors may appeal to the board of supervisors, at their next meeting, who shall have power to correct and review such assessment." And if the owner desired to bring suit he should have done so within six months after the statute took effect.

C. The owners and parties in interest had until the expiration of six months after June 5, 1885, to bring any action they desired, to vacate the tax, or any sale, conveyance or certificate made thereunder, or to regain possession of the land. (Laws 1885, chap. 448, § 2.)

The owner was authorized to bring a direct action against the Comptroller to vacate the tax sale or conveyance or certificate of sale made thereunder. (Laws 1885, chap. 448.) If it be conceded that the owner could not apply to the Comptroller for cancellation, he could nevertheless proceed against him by action. If the Comptroller could not be made a *judge to try conflicting titles on application by the owner*, he could be made a party in an action brought by the owner.

The distinction is plain. The form of proceeding would

be different; the relief and result would be the same. Where the State is the purchaser it would be absurd to argue that if the owner is not permitted to apply to the Comptroller for cancellation, but must pursue another method to secure the same relief, he is, therefore, deprived of a constitutional right, and still more absurd to claim that the State would not be bound by an action brought against the Comptroller to the same extent as by an application for cancellation made to the Comptroller. Not only applications, but actions, are referred to in the statute, and it is plain that the word "action" is not used in any narrow or technical sense.

D. The Forest Commissioners could have been made defendants.

Section 11, chapter 283, Laws of 1885, provided: "The Forest Commission may bring in the name or on behalf of the People of the State of New York any action to prevent injury to the Forest Preserve * * * which any owner of lands would be entitled to bring. * * * With the consent of the Attorney General and the Comptroller, the Forest Commission may appoint attorneys and counsel *to prosecute any such action or to defend any action brought against the commission or any of its members or subordinates arising out of their or his official conduct with relation to the Forest Preserve.*"

The court held in *People v. Turner*, 145 N. Y. 461, that the State held through the Forest Commission the actual possession of the lands in question.

About the correctness of this proposition there is no room for question. The Court of Appeals again held this explicitly in 151 N. Y. 540, in the case of *People ex rel. Millard v. James A. Roberts, Comptroller*. In

that case O'Brien, J., says: "If the sale is invalid, his title (the owner's) is not affected, and he may keep and defend his possession, or if put out of possession, *regain it by action of ejectment.*" In this case the land had been bid in for the State at a tax sale and duly deeded to the State by Comptroller's conveyance.

Still more recently, the Court of Appeals, in the case of *People ex rel. The Forest Commission v. Campbell*, 152 N. Y. 51, speaking of the title of the plaintiff in error to the very land in question, has held that the possession of that commission is the possession of the State and they may sue or be sued accordingly. They may defend their possession of the lands in the Forest Preserve.

The court says: "The act (instituting the Forest Commission) *clearly contemplates not only actions brought by the commission in the name of the State, but actions against the commission or any of its members or subordinates arising out of their official action.*"

The case referred to in 152 N. Y. reaffirms the doctrine laid down in 145 N. Y. The court says: "The case of *People v. Turner*, referred to in the opening of this opinion, was affirmed in this court (145 N. Y. 451), and it was then held that the State was placed in constructive possession of the lands in question, through the Comptroller's purchase and deed, but that subsequently *it was in actual possession* by reason of the creation of the Forest Commission and the powers and duties devolved upon it by the act of 1885. *The possession of the commission is the possession of the State.*"

Here then we have three distinct declarations by the Court of Appeals of the State of New York that the

Forest Commission, by virtue of chapter 283 of the Laws of 1885, was placed in the actual possession of the Forest Preserve, empowered not only to bring but to defend actions and the further holding that their possession is the possession of the State. In two of these cases the land in controversy in this case was under consideration.

Chapter 283 went into effect May 15, 1885 and the validating act (chap. 448) went into effect June 9, 1885. We quote from 152 N. Y. 57. "It is necessary to determine " the precise powers conferred upon the Forest Commission by chapter 283 of the Laws of 1885. The first section of the act creates the commission; the seventh "section defines what lands shall be known as the Forest " Preserve, and the ninth section declares 'the Forest " Commission shall have the care, custody, control and "superintendence of the Forest Preserve.' The subsequent provisions of the act confer numerous and detailed " powers upon the commission, but those bearing upon " this case are to be found in section 11, which provides, " among other things, as follows: 'The Forest Commission may bring in the name, or on behalf, of the People " of the State of New York any action to prevent injury " to the Forest Preserve or trespass thereon; to recover " damages for such injury or trespass; to recover lands " properly forming part of the Forest Preserve, but occupied or held by persons not entitled thereto, and in all " other respects for the protection and maintenance of " the Forest Preserve, which any owner of lands would be " entitled to bring.' The section proceeds to confer upon " the commission detailed powers in bringing actions for " trespass, and then closes as follows: 'With the consent " of the Attorney-General and the Comptroller, the Forest

“Commission may employ attorneys and counsel to prosecute any such action, or to defend any action brought against the commission, or any of its members or subordinates arising out of their or his official conduct with relation to the Forest Preserve. Any attorney or counsel so employed shall act under the direction of and in the name of the Attorney-General. Where such attorney or counsel is not so employed, the Attorney-General shall prosecute and defend such actions.”

“It will thus be observed that the commission is given the absolute care, custody, control and superintendence of the Forest Preserve, and are authorized for its protection and maintenance to bring any and all actions and proceedings which an owner of land would be entitled to institute. The commission may retain counsel with the consent of the Attorney-General and Comptroller, and, if this is not done, it is made the duty of the Attorney-General to act in their behalf. The act clearly contemplates not only actions brought by the commission in the name of the State, but actions against the commission, or any of its members or subordinates arising out of their official action.

“It is difficult, when we consider these sweeping provisions, to believe that it was not the intention of the Legislature to clothe the commission with the amplest and most complete powers to represent the State in the Forest Preserve.

* * * * *

“The case of *People v. Turner*, referred to in the opening of this opinion, was affirmed by this court (145 N. Y. 451), and it was there held that the State was placed

"in constructive possession of the lands in question
"through the Comptroller's purchase and deed, but that
"subsequently it was in actual possession by reason of
"the creation of the Forest Commission, and the powers
"and duties devolved upon it by the act of 1885. The
"possession of the commission is the possession of the
"State." *

There was no obstacle in the way to prevent the alleged owner of this property from commencing suit against the Forest Commission at once to test the title of the State to the lands in question, and to determine the regularity of all proceedings.

E. Again, it was provided by section 4 of chapter 453, Laws of 1885: that "from and after an advertisement once a week for three successive weeks of a list of wild, vacant or forest lands, to which the State holds title from a tax sale or otherwise, in one or more newspapers to be selected by the Comptroller, published in the county in which said lands may be located, all of such wild, vacant or forest lands shall be deemed and are hereby declared to be in the actual possession of the Comptroller of this State, and such possession shall be deemed to continue until he has been dispossessed by the judgment of a competent tribunal."

There is no evidence here that the plaintiff or any of its grantors ever sought, during the six months elapsing after the passage of chapter 448, Laws of 1885, which became a law on the same day as chapter 453 (June 9, 1885), to have the Comptroller take the actual possession of these lands. There can be no doubt but that if the Comptroller failed to so advertise he could have been

* The Comptroller's Deed vests in the grantee an absolute Estate in the simple. - Appendix P. 51. Rec. 63.
Ejectment will lie against a person whose title is based on a deed of a person whose occupation is not shown.

compelled to do it by *mandamus*, and there can be little dispute as to the purposes of this act, which was passed upon the same day as the curative and limitation statute aforesaid. It was to add facilities to those already existing under section 11, chapter 23, Laws of 1885, for an aggrieved owner to recover lands to which the State maintained a claim of title and ownership.

"Where power is given to public officers in permissive language, 'as that they *may*, if deemed advisable,' do a certain thing, 'whenever the public interest or individual rights call for its exercise,' the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases, it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."

Supervisors v. U. S., 4 Wall. 435, 446 7,
and New York cases cited.

City of Galena v. Amy, 5 Wall. 705,
708-9.

Mayor, etc., of New York City v. Furge,
3 Hill, 612.

Mason v. Fearson, 9 How. (U. S.) 237,
and cases cited.

People v. State Ins. Co., 19 Mich. 392.

East Boston Ferry Co. v. Mayor, etc.,
101 Mass. 488.

F. The owners and parties interested could have commenced suit at once to remove a cloud from the title

The statute provides that all conveyances that had been recorded for two years and all outstanding certificates that had remained in force for two years after the last day allowed by law to redeem, should, six months after the law took effect, be conclusive evidence of regularity, and that all other conveyances should be conclusive evidence of regularity after the expiration of two years from the date of recording, and all other certificates conclusive evidence four years from and after the date of issuing such certificates. The owner or occupant is allowed two years after the date of sale to redeem. (Appendix, p. 47, § 50.) As to all cases where the certificate had been issued for four years or the conveyance recorded for two years at the time the law went into effect an action could have been commenced at once to vacate the certificate or deed, as a cloud upon the title. As to all other cases where it appeared that the Comptroller intended to execute a conveyance, an equitable action could be maintained to prevent a cloud upon the title. The Comptroller's intention would be indicated by his advertising for redemption.

Sanders v. Village of Yonkers, 63 N. Y. 489.

Clark v. Davenport, as Comp., 95 N. Y. 477. (In this case the State was the purchaser.)

Hagner v. Hall, 10 App. Div. 581.

Sanders v. Downs, 141 N. Y. 424.

The lawfulness of the possession of the Comptroller or the Forest Commission, and the right and title of the State to the property may, by a court of competent jurisdiction, be the subject-matter of inquiry, and adjudged accordingly.

United States v. Lee, 106 U. S. 196.

As has been hereinbefore demonstrated, the State, by the acts of its Legislature, as construed by its courts, has submitted its title to lands purchased for nonpayment of taxes to the jurisdiction of a judicial tribunal, and has pointed out the way in which such title can be tested.

In the recent case of *The Saranac Land and Timber Company v. James A. Roberts*, as Comptroller, 68 Fed. Rep. 521, the court, speaking of the possession of the Comptroller, says:

"But suppose the court proceeds a step further, and assumes that the defendant is sued and will justify under chapter 711 of the Laws of 1893. Section 13 of that act provides: 'The Comptroller may advertise once a week for at least three weeks successively, a list of the wild, vacant and forest lands to which the State holds title, from a tax sale or otherwise, in one or more newspapers to be selected by him, published in the county in which the lands are situated, and from and after the expiration of such time all such wild, vacant or forest lands are hereby declared to be and shall be deemed to be in the actual possession of the Comptroller, and such possession shall be deemed to continue until he has been dispossessed by a court of competent jurisdiction.'"

"This section must be considered in its entirety. The "last clause can not be ignored. It would seem clear that "it was the intention of the Legislature to submit the "question of the Comptroller's title to the decision of a "court having jurisdiction. It was conceded at the argu- "ment that the theory of the demurrer made the clause "in question inoperative, and would enable the defendant "to seize and hold the property of others without being

“amenable to the process of any court. There is no
 “occasion for so drastic a construction. In placing the
 “Comptroller in possession of the forest lands the Legis-
 “lature recognized the probability of controversies over
 “his title, and pointed out the manner in which such dis-
 “putes should be decided. The plaintiff is pursuing the
 “remedy of the statute. It is a suit sanctioned by the
 “State. (Regan v. Trust Company, 154 U. S. 364, 392.)”

It must be assumed that all the courts of the State
 would give full force and effect to these provisions.

“When the inquiry is whether a State enactment under
 “which property is proposed to be taken for a public
 “purpose accords full opportunity to the owner, at some
 “stage of the proceedings involving his property, to be
 “heard as to their regularity or validity, we must assume
 “that the inferior courts and tribunals of the State will
 “give effect to such enactment as interpreted by this
 “highest court of that State.”

Lent v. Tillson, 140 U. S. 328.

How, then, was the owner deprived of any rights or
 remedies? He could have appeared before the board of
 supervisors. He could have redeemed. He could have
 sued the Forest Commission. He could have taken action
 against the Comptroller. He could have brought suit to
 cancel the tax sale and conveyance. He could have
 brought an action of ejectment. He could have sued to
 remove a cloud from his title.

The best that can be said of the grantors of the plain-
 tiff in error is that they have slept on their rights, if any
 they have had; they have neglected their remedy, and
 having had the opportunity to have their grievances

remedied, and waited until the bar of the statute has fallen, and having stood by and seen the State maintain these lands, and incur the burdens thereof, it seems the plaintiff in error can urge no just complaint against the operation of the law which makes secure the title of the State, a purchaser at the tax sale.

At the time of the pretended sale to the plaintiff in error, neither the owner nor his representatives had any remaining interest in the land. The time for them to take action had expired.

The statutes of the State relating to cancellation by the Comptroller of tax sales were enacted for the benefit of the purchaser. If the sale is invalid, the plainest principles of justice would require that the sale should be canceled by the Comptroller and the money refunded to the purchaser. The owner must pursue another remedy.

People ex rel. Wright v. Chapin, 104 N. Y. 369.

People ex rel. Ostrander v. Chapin, 105 N. Y. 309.

Ostrander v. Darling, 127 N. Y. 70.

People ex rel. Hamilton Park v. Wemple, 139 N. Y. 240.

People ex rel. Witte v. Roberts, 144 N. Y. 234.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

Although it has been suggested by the Court of Appeals that the owner might apply for cancellation, upon more mature consideration it has been determined by that court that the owner should commence a direct action where the conflicting claims of all parties interested can be determined by judicial decree.

The owner has, however, ample protection. He can

pay his taxes at the time and in the manner required by law; he can make complaint to the assessors upon grievance day; he is permitted to appear before the supervisors; he is allowed to redeem; if an action is commenced to evict him, he may set forth invalidity of the sale; he is authorized to commence suit by way of ejectment against the Forest Commission or Comptroller; he can sue the Comptroller to vacate the sale and conveyance; he is deprived of no substantial right. But if his action is based upon irregularities he must bring his action within four years after the certificate is issued and two years after the conveyance is recorded.

By the decisions in *People v. Turner*, 117 N. Y. 227, and *People v. Turner*, 145 id., and other cases, holding that chapter 448, Laws of 1885, considered as an act of limitation, afforded the landowner a reasonable opportunity to enforce his rights, the Court of Appeals of New York has established a rule of property in the State of New York which is binding on the United States courts. After such a settled course of decisions upon the act of limitation under consideration, a contrary decision by this court would present a conflict between the State courts and those of the United States productive of incalculable mischief. Many conveyances of land have been made and large sums of money paid therefor and purchasers have entered into possession and made extensive valuable improvements thereon upon the strength of these decisions. A contrary decision by the United States Supreme Court would resurrect thousands of dead claims. The United States courts will adopt the State decisions because they settle the law applicable to

the case, and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State, when applied to the title of lands.

- Geekie v. Kirby Carpenter Co., 106
U. S. 385.
Jackson v. Chew, 12 Wheat. 166, 167.
Barret v. Holmes, 102 U. S. 655.
Beauregard v. New Orleans, 18 How. 502.
Suydam v. Williamson, 24 How. 427.
Nichols v. Levy, 5 Wall. 433.
Williams v. Kirtland, 13 Wall. 306.
Sanger v. Nightingale, 122 U. S. 184.
Green v. Neal, 6 Peters, 291.
Harpending v. Dutch Church, 16 Peters,
455.
Porterfield v. Clark, 2 How. 76.
Elmendorf v. Taylor, 10 Wheat. 152.
Bk. of Hamilton v. Dudley, 2 Peters, 492.
U. S. v. Morrison, 4 Peters, 124.
Gaines v. Dunn, 14 Peters, 322.
Bailey v. Magwire, 22 Wall. 215.

CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR.

In none of the cases cited by the learned counsel for the plaintiff in error was the effect of a statute of limitations or curative statute considered in connection with the defect here complained of. The distinction between "jurisdictional," as used in a direct action *without* the intervention of a statute of limitations or curative statute and as used in connection with such a statute, is clearly pointed out in *Ensign v. Barse*, 107 N. Y. 346, where the court says:

"The opinion in the present case is careful not to deny
"a possible fatal result of the defect, although it is rather

“ formal than substantial, but for the curative effect of
 “ the statute of 1882, which had no parallel in any form
 “ in the facts of the cited case. In the opinion then
 “ delivered, the defect was not deemed jurisdictional in
 “ any other sense than the modified one of an essential
 “ condition under the law as it stood. Whether it was
 “ so jurisdictional as that the Legislature could not have
 “ dispensed with it, and, therefore, could not cure its
 “ omission, is a very different inquiry. A defect may be
 “ in one sense jurisdictional relatively to the authority of
 “ the assessors acting under any existing law, and yet not
 “ so as it respects the power of the Legislature to pass a
 “ statute curing the defect; and it is only by confusing
 “ these two things, which the opinion separated, that a
 “ seeming contradiction can be reached.”

The learned counsel for the plaintiff in error refuses to accept the construction of the New York statutes which has been given them by the courts of that State.

1. He cites a large number of cases in which defects, although irregularities, might be loosely termed jurisdictional, in the absence of a curative statute limiting the time within which such irregularities could be urged. (Brief for plaintiff in error, pp. 14 to 21.)

In the case of *Westfall v. Preston et al.*, 49 N. Y. 349 (decided in 1872), suit was brought by the owner of premises irregularly assessed, against the assessors and other officers, and none of the questions under consideration here were involved in that case.

In the case of *Jewell v. Van Steinberg* (1874), 58 N. Y. 85, no notice was given to the property owners, as required by statute, although it was held in that case that if the

party whose property is assessed appears and is heard, or has an opportunity to be heard, in reference to the assessment, that that would be a waiver of notice, and that the property owner would be concluded thereby.

In the case of *Bradley v. Ward* (1874), 58 N. Y. 401, the court held : The defects complained of were irregularities as between the parties.

It will be found by examination of all the other cases cited by the counsel, among others, *Smith v. Mosher*, 31 St. Rep. 235 ; *People v. Hagadorn*, 104 N. Y. 516 ; *Shattuck v. Bascom*, 105 id. 39 ; *Johnson v. Ellwood*, 53 id. 431 ; *Thompson v. Burhans*, 61 id. 52, that the question as to whether the defects complained of were irregularities within the meaning of the curative act of 1885, or jurisdictional in their nature, was not considered.

The Court of Appeals has held, in the case now under review, that under the statutes of the State of New York the neglect to verify the assessment-roll upon the third Tuesday in August, or of the assessors to meet upon that day, was not such a jurisdictional omission as would relieve the property owner from commencing the proper action within the time limited and specified by the curative act of 1885.

2. The counsel for plaintiff in error (pp. 21 to 28) argues that the Legislature can not convert a deed which is void and a nullity by reason of jurisdictional defects into a valid conveyance. This is a self-evident proposition. The Legislature of New York has not attempted to do so. The courts of that State have held that it could not do so. It has simply provided that actions based upon defects which are irregularities and not juris-

dictional must be commenced within a certain period of time. In *Cromwell v. MacLean*, 123 N. Y. 474, the court (Peckham, J.) clearly defines the distinction between the cases of *People v. Turner* and *Ensign v. Barse*, and the case here considered, as well as between the two statutes. This (*Cromwell v. MacLean*) was a case where nonresident lands were assessed to the estate of a certain person which would clearly be a failure of assessment. The court says (pp. 489-490):

“Nor is the legislation in question an exercise of the power to provide rules of evidence and thus to give a certain effect to a deed or lease as presumptive evidence of the validity of proceedings before its execution. (*People v. Turner*, 117 N. Y. 227.) Nor does it attempt to set up a statute of limitations providing that after the expiration of a certain time it should be conclusively presumed that all proceedings were regular. (*People v. Turner*, *supra*; *Ensign v. Barse*, 107 N. Y. 329.) It is none of these, but a plain, naked transfer of title by legislation. Any statute which should make a tax deed or lease immediately upon its execution conclusive evidence of a complete and perfect title and thus preclude the owner of the original title from showing its invalidity, would probably be void, because it would, in substance, be an unconstitutional transfer or a confiscation of property, instead of a mere law regulating evidence. I do not refer to cases arising under statutes of limitation, where the owner has some appointed time in which to assert his rights. nor to cases resting on principles of equitable estoppel. (*Cooley on Taxation* [2d ed.], 297 *et seq.*)”

The courts of New York have repeatedly held that the curative act of 1885 only applies to irregularities, and as far as this particular case is concerned, have held that the omission of the assessors to meet or take their oath upon the third Tuesday of August was an irregularity and not a jurisdictional defect.

The case cited in 2 Allen, 361 (129 Mass. 559), simply holds that there does not exist in the Legislature a power to cure defects in the proceedings of courts if they have acted without jurisdiction.

The case cited in 129 Mass. 559 refers to a statute entirely different in its terms and provisions from the New York law, and providing that certain tax sales theretofore had should not be invalid unless proceedings had been instituted to test the validity of such sales, and containing various other provisions, which, while it permitted certain owners to test the validity of tax sales, debarred certain other owners from commencing any action whatever.

The case cited in 23 Wis. 102, repeats the familiar proposition that the Legislature can not make a void deed valid.

In the case cited in 97 U. S. 687, Congress passed an act ratifying and validating certain assessments in the District of Columbia. The court says, at page 690, "Congress may legislate within the district, respecting the people and property therein, as may the Legislature of any State over any of its subordinate municipalities. It may, therefore, cure irregularities and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

The learned counsel concedes the right of the Legislature to enact curative acts relating to tax titles. At page 25 he says: "The defects in the tax proceedings shown in the present case anterior to the sale — the improper verification of the roll, and the failure of the assessors to meet to review their assessments — might no doubt have been cured as regards the tax itself, giving, of course, the opportunity to the landowner to pay the tax when validated, and in default of payment the land might then have been sold."

The Legislature, however, has been much more liberal than the learned counsel desires, and has given the parties interested in the land ample time and opportunity to commence any action which they may desire to test the regularity of any of the proceedings; providing, however, that such actions shall be commenced within a prescribed limit; but imposing no limit as to void proceedings. If the tax sale or conveyance is set aside, the owner is not required to pay taxes irregularly levied, though doubtless the taxing officers might reassess the land.

3. The remainder of the counsel's brief is an argument, in the main, that the owners and persons interested in the property did not have any opportunity to try their rights in the courts; that there was no officer of the State in actual possession; that the State would not be bound by the judgment. As we have already demonstrated in our brief, the courts of the State of New York have held the direct converse of all these declarations of the learned counsel.

145 N. Y. 461.

151 N. Y. 540.

152 N. Y. 51.

95 N. Y. 477.

68 Fed. Rep. 521.

In the case of *The Saranac Land and Timber Company v. James A. Roberts*, as Comptroller, etc., 68 Fed. Rep. 521, an action of ejectment was brought against Mr. Roberts, as Comptroller of the State of New York, to test the title of the State of New York in certain lands located in the same township as the lands involved in the present suit. The Comptroller demurred to the complaint. The action having been brought under section 13 of chapter 711 of the Laws of 1893, which is similar in its terms to the provisions of section 4, chapter 452 of the Laws of 1885, to which we have heretofore referred, authorizing the Comptroller to advertise once a week for at least three weeks, lands to which the State holds title, and provided at the expiration of that time that said lands should be deemed to be in the actual possession of the Comptroller. The demurrer was overruled, and the case has been tried in the United States Circuit Court of the Northern District of New York, and is in the hands of the court for decision.

The learned counsel for the plaintiff in error in this case is also the counsel for the plaintiff in the action tried in the Circuit Court.

The counsel in his brief, submitted in *The Saranac Land and Timber Company* case, has insisted that the judgment of the court in that case would be binding upon the State of New York, which holds title to the land in dispute in said case.

In his brief submitted in the case he says: "It would seem, therefore, that the Legislature had in mind the necessity of ousting the true owner in order to convert his estate in possession into a right of action, to the

“end that the limitation which they were establishing
 “might run against it. They provided expressly for
 “putting the State, through the Comptroller, in posses-
 “sion. Had this notice been published at the time the
 “tax deed was executed, the former owner, Norton,
 “would have been disseized and an appropriate case
 “would have existed for the operation of a limitation
 “law. This was, we think, the purpose and intent of the
 “Legislature. It failed of accomplishment through the
 “inaction of the Comptroller. It is, we think, plain law
 “that neither the execution nor the recording of a void
 “tax deed operates of itself to divest the true owner of
 “the constructive possession of vacant lands.”

The counsel repeats this language at page 73 of present brief.

The Mr. Norton referred to as a former owner in the Saranac Land and Timber Company case, is the same Norton referred to in this case now before the Supreme Court of the United States. By a peculiar course of reasoning, the counsel attempts to demonstrate that the title of the State can be tested in an action against the Comptroller in possession in the Saranac Land and Timber Company case; but can not be tested in an action against the Forest Commissioners, whom the Court of Appeals have repeatedly declared are in actual possession of the land in controversy, by virtue of the statute establishing that commission, or against the Comptroller by virtue of an action expressly authorized by chapter 448 of the Laws of 1885.

Notwithstanding the fact that the highest court of the State of New York, in construing its own statutes, has

declared that the title of the State can be tested in a direct action and that the Forest Commission and the State have been placed in actual possession of the land in controversy by virtue of the law establishing that commission, to wit: Chapter 283, Laws of 1885, and the tax laws of the State, the learned counsel insists that said courts either have no right to construe, or else are in error in construing the meaning of the statutes of their own State.

IV.

The judgment of the courts of New York should be affirmed, and the writ of error dismissed.

T. E. HANCOCK,

Counsel for the State of New York, Albany, N. Y.

IN THE
SUPREME COURT
OF THE
UNITED STATES,

OCTOBER TERM, 1897.

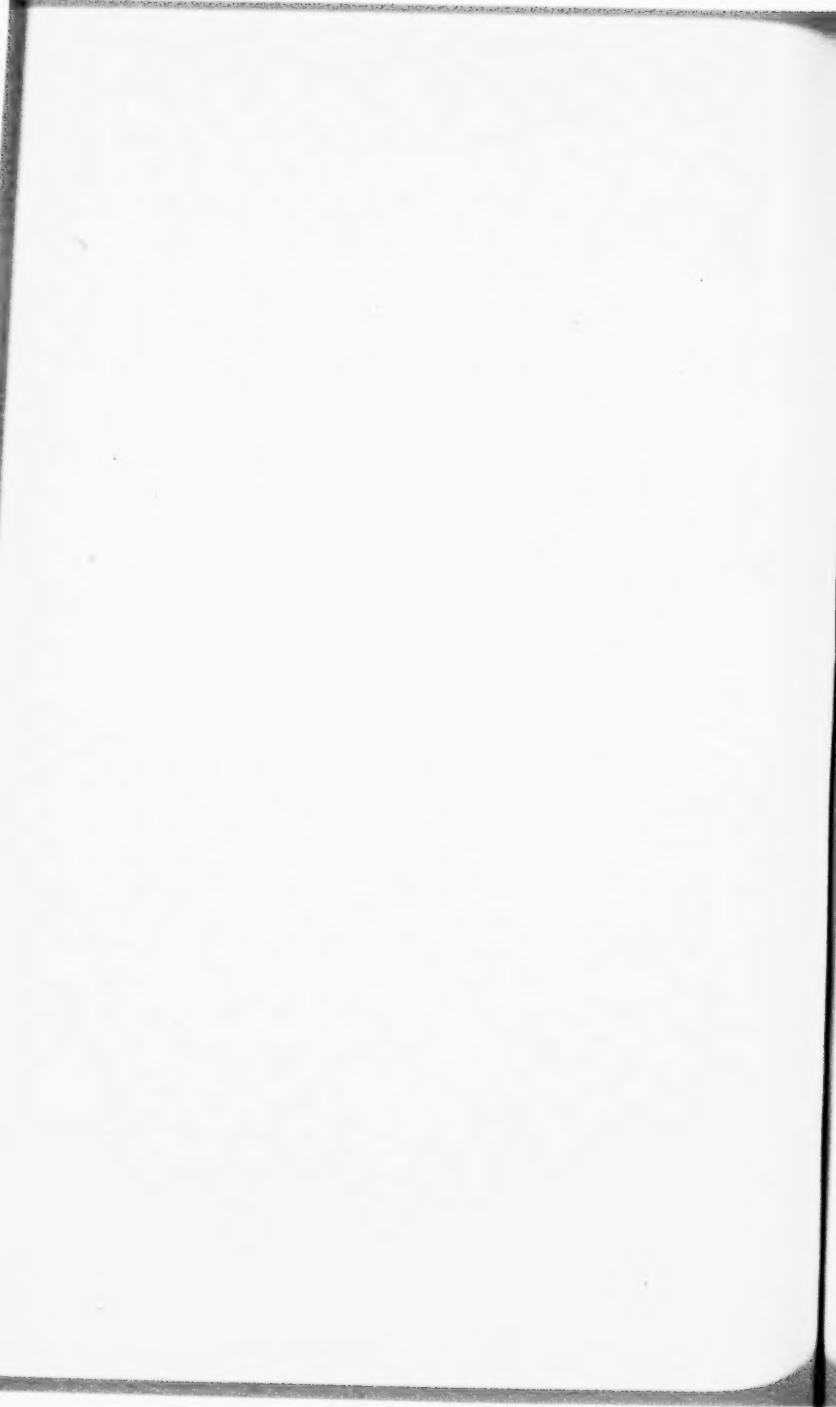
No. 41.

BENTON TURNER, PLAINTIFF IN ERROR,
against
THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

T. E. HANCOCK,
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Counsel for Defendant in Error,
Capitol, Albany, N. Y.

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1897.



IN THE
SUPREME COURT
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OCTOBER TERM, 1897.

UNITED STATES SUPREME COURT.

BENTON TURNER, PLAINTIFF IN ERROR,

agst.

THE PEOPLE OF THE STATE OF NEW
YORK, DEFENDANT IN ERROR.

No. 41.

Brief of Defendant in Error in opposition to application of Plaintiff in Error for reargument or modification of the judgment of affirmance in above entitled case, rendered by the Supreme Court of the United States.

I.

There are no equities or merits in the case of the Plaintiff in Error.

The land described in the pleadings was sold by the Comptroller of the State of New York October 12, 1877, for unpaid taxes of the years 1866 to 1870, inclusive, and

the premises were purchased in behalf of the State. The two years allowed for redemption expired October 12, 1879; the premises were deeded to the State June 9, 1881, and the deed was recorded June 8, 1882. The title of the State to this property, by virtue of the tax sale, was never questioned by the owners or any other person in interest; but it appears that the plaintiff in error, presumptively and no doubt actually, with full knowledge of all the facts, secured a conveyance of these premises from one Riley, December 27, 1886, over nine years after the conveyance to the People of the State of New York, and has undertaken to assert title to the land as against the State, by reason of two technical irregularities which were really trivial in their nature, in no way prejudicing the rights of the original owners; one of the irregularities being that the assessors, in preparing the assessment-roll for the year 1867, took their oath, as to the correctness of the roll upon the 10th day of August, instead of on the third Tuesday of August; the second irregularity charged being that in the year 1870 the assessors did not meet on the third Tuesday of August for the purpose of reviewing their assessment.

As was pointed out upon the argument, section 5 of chapter 176, Laws of 1851, made ample provision for this very contingency, providing that, in case of the neglect of the assessors to meet for review upon the third Tuesday of August, "any person aggrieved by the assessment of the assessors may appeal to the board of supervisors at their next meeting, who shall have power to review and correct such assessments."

II.

The statute which Mr. Turner is attempting to have declared unconstitutional and void (Chapter 448, Laws 1885) became a law June 9, 1885, and its validity has never been questioned by any of the courts of the State of New York.

It is respectfully urged that the plaintiff in error ought not to be permitted to any further assail the constitutionality and binding force of a statute confirmed by a uniform line of decisions, relying upon which numerous conveyances of land have been made, large sums of money have been paid and a rule of property has been established.

III.

While it is true that the Court of Appeals, upon mature consideration, has come to the conclusion that the owner should not be permitted to apply to the Comptroller for cancellation, and thereby make him a court to test and decide the respective claims of title that might be advanced by the purchaser and the owner, the learned counsel for Mr. Turner is entirely in error in claiming or suggesting that the property owner has not always had ample opportunity to test the regularity of assessments and tax sales, providing action was commenced therefor within the reasonable time provided by statute.

It was suggested by the Court of Appeals in this case (145 N. Y. 457; 117 id. 227) that the owner might apply

to the Comptroller for cancellation ; but the court thereafter specifically declared that this statement was a mere inadvertence and was not at all necessary to the decision of the case.

139 N. Y. 247, 248.

151 N. Y. 540.

It would appear that the language of the statute is plain enough and clearly points out that *an action could be brought against the Comptroller* to vacate the tax sale or conveyance or certificate of sale. The learned counsel persists in his contention that, because the Comptroller could not be made a judge to try conflicting titles upon an application by an owner, he could not be made a party in an action brought by the owner. *Non sequitur*. The statute says (Chap. 448, § 2): "The provisions of this act * * * shall not affect any action, proceeding or application pending at the time of its passage; *nor any action that shall be begun* * * * for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder."

It is perfectly plain, from the language of the statute, that it contemplates that an action could be commenced against the Comptroller, not of ejectment, but for the purpose of vacating tax sales, conveyances and certificates, if brought within the time provided by statute. We have here the owner of the lands, the Comptroller, and a statute expressly authorizing an action to be commenced for the purpose of vacating the sale, if brought within the time prescribed by statute; and we have also Mr. Benton Turner, who acquired title to this land many years after it was bought by the State, complaining that the owner was deprived of his day in court.

Moreover, the case of *Clark v. Davenport*, 95 N. Y. 477, recognizes the right of an owner to commence an action against the Comptroller to set aside a deed as a cloud upon title, if the action is brought at the proper time, based upon the proper facts authorizing actions of this character to be commenced.

IV.

The plaintiff in error complains that he or his grantor, or some other person, has been deprived of rights and remedies which none of them ever attempted to assert. The learned counsel is not correct in stating that any new rule was laid down in *People v. Roberts*, 151 N. Y. 540, or *People ex rel. Forest Commission v. Campbell*, 152 N. Y. 51.

In the case of *People v. Turner*, 145 N. Y., the court says, at page 456: "The lands in question are within 'what is known as the 'Forest Preserve of the State of New York,' and the second section of the act of 1885 'makes its provisions applicable to those counties which include the Forest Preserve. The six months mentioned in the act, within which tax sales and proceedings might be open to question after the act went into effect, expired December 9, 1885. The Forest Commission had been established in May, 1885, and, by the act creating that commission, it was given the care, custody, control and superintendence of the Forest Preserve. A warden was employed by the Forest Commission, who discovered the cutting of the timber by the defendant, and this action was then brought, in behalf of the People, by the Forest Commission."

And, again, at page 461: "While we think the People
 "were not bound to take any steps toward actual possession, after the conveyance to them of the land, any doubt
 "upon the subject would seem to be eliminated by virtue
 "of the provisions of the act which created the Forest
 "Commission and placed the Forest Preserve, within
 "which are the lands in question, in the care, control
 "and supervision of the commission. The constructive
 "possession which the State had acquired, I think, was
 "made an actual possession by the powers and duties
 "devolved upon the Forest Commission as its representative."

And this doctrine is reiterated by the court in the cases above referred to in 151 N. Y. and 152 N. Y.

V.

The counsel persists in going outside of the record to sustain his contention that the Forest Commission did not come into existence until September, 1885.

The act appointing the Forest Commission went into effect May 15, 1885. The counsel states in his supplemental brief filed upon the argument of the case (page 13) that upon this same day, to-wit, May 15, 1885, three Forest Commissioners were nominated by the Governor, and duly confirmed, and there is no pretense that at least one of them, Theodore E. Basselin, did not at once take and file his oath of office, and there is no presumption that the other two did not take and file the necessary oath. We think it extremely absurd for

the counsel to argue, in face of the decisions of the Court of Appeals of the State of New York, that there was not a Forest Commission in existence. In the case of *People v. Turner*, 145 N. Y. 456, the court says: "The Forest Commission had been established in May, 1885." In the case of *People ex rel. Forest Commission v. Campbell*, 152 N. Y. 58, the court says: "The case of *People v. Turner*, referred to in the opening of this opinion, was affirmed in this court (145 N. Y. 451), and it was there held that the State was placed in constructive possession of the lands in question through the Comptroller's purchase and deed, but that subsequently it was in actual possession by reason of the creation of the Forest Commission and the powers and duties devolved upon it by the act of 1885. The possession of the commission is the possession of the State."

How, then, can it be urged by the learned counsel, in view of these facts as well as the emphatic declarations of the Court of Appeals of the State, that the State could be permitted to allege in defense to an action against the Forest Commission that there was no Forest Commission in existence? Furthermore, chapter 448, Laws of 1885, has been construed as a statute of limitations, and if we were to concede everything alleged, either as a matter of fact or a matter of law, by the learned counsel for the plaintiff in error, according to well-established principles, the omission to appoint a Forest Commission would only operate as a suspension of the statute *pro tanto*, that is, for the period of four months. The statute would certainly begin to run when

the property owners had it in their power to make their cause of action complete, and there was a body in existence against which action could be commenced. A suspension of the statute for four months would not operate as a suspension *ad infinitum*. It is to be observed, however, that the Forest Commission is a continuous body. The statute itself (chapter 283, Laws of 1885, section 1) constitutes the *Forest Commission*. Proceedings are instituted not by or against the commissioners as individuals or as officers, but as a Forest Commission. Thus it was held in *People ex rel. Forest Commission v. Campbell*, 152 N. Y. 51, that "The Forest Commission has "been a continuous body since its creation under chapter "283, Laws of 1885."

It is respectfully urged that all the applications made in behalf of the plaintiff in error should be denied.

T. E. HANCOCK,

*Attorney for Defendant in Error, the People of the State
of New York.*

Statement of the Case.

TURNER v. NEW YORK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 41. Argued April 19, 20, 1897. — Decided October 18, 1897.

The statute of New York of 1885, c. 448, providing that deeds from the comptroller of the State of lands in the forest preserve sold for non-payment of taxes shall, after having been recorded for two years, and in any action brought more than six months after the act takes effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, is a statute of limitations, and does not deprive the former owner of such lands of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

This was an action of replevin, brought April 11, 1887, in behalf of the State of New York by the forest commissioners of the State against Turner, in the Supreme Court of the county of Franklin and State of New York, to recover a quantity of logs cut by him upon lands in that county and within the forest preserve of the State, between September 1, 1886, and March 25, 1887. The answer denied the allegations of the complaint, and alleged that at the time mentioned therein the defendant was the owner and in possession of the lands.

The material facts of the case, as found by a referee, were as follows: On October 12, 1877, the lands, being then owned by one Norton, were sold by the comptroller of the State of New York for unpaid taxes of the years from 1866 to 1870 inclusive, and were bid in by the comptroller in behalf of the State, and conveyed by him to the State by deed dated June 9, 1881, and recorded June 8, 1882. The defendant, more than nine years after that sale, acquired Norton's title in the land. The land was wild forest land, uncultivated, unimproved, unenclosed, and with no dwelling house or other building thereon. Neither the State nor any officer thereof ever took actual possession of the land; and no part of it was in occupancy of any person on October 12, 1879, when the

Statement of the Case.

period of two years allowed by law for redemption from the comptroller's sale expired.

At the trial before the referee, the defendant, in order to prove the invalidity of the comptroller's deed by reason of illegality in the assessment of the taxes for the years 1867 and 1870, offered to show that the oath of the assessors to the assessment roll of 1867 was taken on August 10, instead of on the third Tuesday of August; and that the assessors omitted to meet on the third Tuesday of August, 1870, to review their assessments for that year.

The plaintiff objected to the evidence as immaterial, because the comptroller's deed was made conclusive evidence of those matters by the statute of New York of 1885, c. 448, which is copied in the margin.¹ The defendant contended that this

¹ An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes."

SECT. 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller; and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same or in any manner relating thereto; and all other conveyances or certificates, heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of

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statute was invalid as contrary to the first section of the Fourteenth Article of Amendment to the Constitution of the United States. But the referee sustained the plaintiff's objection to the evidence, and directed judgment for the plaintiff, which was accordingly rendered by the court, and affirmed by the Court of Appeals. 145 N. Y. 451. The defendant sued out this writ of error.

Mr. Frank E. Smith for plaintiff in error. *Mr. Thomas F. Conway* was on his brief.

Mr. T. E. Hancock, Attorney General of the State of New York, and *Mr. William Henry Dennis* for defendant in error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

On May 15, 1885, the legislature of New York, by the statute of 1885, c. 283, declared that all the lands then owned or thereafter acquired by the State of New York within certain counties (one of which was Franklin county) should constitute and be known as the forest preserve; and established a forest commission of three persons, styled forest commissioners, to "have the care, custody, control and superintendence of the

two years from the date of recording such other conveyances, or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

SECT. 2. The provisions of this act are hereby made applicable only to the following counties, viz. Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

SECT. 3. This act shall take effect immediately.

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forest preserve," and "to maintain and protect the forests now in the forest preserve, and to promote as far as practicable the further growth of forests thereon;" and authorized them to appoint a warden and other officers, and to exercise various powers to carry out its object.

At the date of the passage of that statute, the time allowed by law for the redemption of lands from sale by the comptroller for non-payment of taxes was two years from the time of sale. New York Stat. 1855, c. 427, § 50.

On June 9, 1885, the legislature of the State passed the statute of 1885, c. 448, to take immediate effect, which provided that all conveyances, thereafter executed by the comptroller, of lands, in the same counties, sold by him for non-payment of taxes and having been recorded for two years in the clerk's office of the county in which the lands lay, should, "six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular" and as required by law; but that all such conveyances and the taxes and tax sales on which they were based, should "be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid."

The land now in question was sold by the comptroller to the State October 12, 1877; the time allowed by law for redeeming the land from that sale expired October 12, 1879; the comptroller's deed to the State was made June 9, 1881, and recorded June 8, 1882. It had therefore been on record for three years when the statute of June 9, 1885, was passed and took effect; and by the terms of this statute, on December 9, 1885, the comptroller's deed became conclusive evidence that there was no irregularity in the assessment of any of the taxes for non-payment of which the land had been sold and

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conveyed to the State. This action was brought April 11, 1887.

The statute, according to its principal intent and effect, and as construed by the Court of Appeals of the State, was a statute of limitations. *People v. Turner*, 117 N. Y. 227; *Same v. Same*, 145 N. Y. 451. It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. *Terry v. Anderson*, 95 U. S. 628, 632, 633; *In re Brown*, 135 U. S. 701, 705-707.

The statute now in question relates to land sold and conveyed to the State for non-payment of taxes; it applies to those cases only in which the conveyance has been of record for two years in the office where all conveyances of lands within the county are recorded; and it does not bar any action begun within six months after its passage. Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale, and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the State in the opinion that the limitation of six months, as applied to a case of this kind, is not repugnant to any provision of the Constitution of the United States.

It was argued in behalf of the plaintiff in error that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights, even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months, he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the Court of Appeals in the case at bar, and in the subsequent case of *People v. Roberts*, 151 N. Y. 540, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct appli-

Syllabus.

cation to the comptroller to cancel the sale, or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local constitution and laws.

It was also argued that the plaintiff in error was in possession of the land and could not be put to his action. But the decision below that he was not in possession involved no Federal question, or any other question of law, but a mere inference of fact from the evidence, which this court is not authorized to review on writ of error. *Dower v. Richards*, 151 U. S. 658; *Egan v. Hart*, 165 U. S. 188.

Judgment affirmed.